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IN THE

Supreme Court of the United States

October Term, 1965

No. 704

JAN HILLEGAS,

Petitioner,

—v.—

JOE SAMS, JR., County Attorney for Lowndes County, Mississippi, and PENN TAYLOR, Sheriff and Custodian of the County Jail of Lowndes County, Mississippi,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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IN THE

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No. .....

JAN HILLEGAS,

Petitioner,

—v.—

JOE SAMS, JR., County Attorney for Lowndes County, Mississippi, and PENN TAYLOR, Sheriff and Custodian of the County Jail of Lowndes County, Mississippi,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered August 16, 1965, rehearing of which was denied September 27, 1965.

Citations to Opinions Below

The order of the United States District Court for the Northern District of Mississippi denying petitioner's application for a writ of habeas corpus is unreported and is set forth in Appendix I hereto, p. 1a *infra*. The opinion of the majority of the Court of Appeals, affirming the order

of the district court, and the special concurring opinion of Circuit Judge Brown are reported at 349 F. 2d 859, and are set forth in Appendix II hereto, pp. 2a-11a *infra*. No opinion was written on denial of petition for rehearing.

Jurisdiction

The judgment of the Court of Appeals was entered August 16, 1965, p. 2a *infra*. Timely petition for rehearing was denied September 27, 1965, p. 14a *infra*. The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1) (1958).

Question Presented

Petitioner, a civil rights worker, was arrested in the Lowndes County, Mississippi courthouse, where she was assisting Negroes to register to vote. She was thereafter charged with vagrancy. Prior to her state trial, she petitioned the United States District Court for a writ of habeas corpus, alleging that the Mississippi vagrancy statute was void on its face for vagueness; that the conduct for which she was prosecuted was conduct protected by the First Amendment, the Privileges and Immunities, Due Process and Equal Protection Clauses of the Fourteenth Amendment and the Fifteenth Amendment; that her prosecution was utterly groundless in fact and was a device designed to harass and punish her and thus to intimidate prospective Negro voter registration applicants, denying them, on racial grounds, the franchise in federal, state and local elections. The district court denied the petition without hearing

on the ground of failure to exhaust Mississippi state judicial remedies.

On this record, did the Court of Appeals for the Fifth Circuit err in sustaining the ruling of the district court that petitioner was required to exhaust her Mississippi remedies?

Constitutional and Statutory Provisions Involved

1. The case involves 28 U. S. C. §§ 2241, 2251 (1958), in pertinent part as follows:

§ 2241. *Power to grant writ.*

(a) Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions.

* * * * *

(c) The writ of habeas corpus shall not extend to a prisoner unless—

* * * * *

(3) He is in custody in violation of the Constitution or laws . . . of the United States; . . .

§ 2251. *Stay of State court proceedings.*

A justice or judge of the United States before whom a habeas corpus proceeding is pending, may, before final judgment or after final judgment of discharge, or pending appeal, stay any proceeding against the person detained in any State court or by or under the authority of any State for any matter involved in the habeas corpus proceeding.

After the granting of such a stay, any such proceeding in any State court or by or under the authority of any State shall be void. If no stay is granted, any such proceeding shall be as valid as if no habeas corpus proceedings or appeal were pending.

2. The case involves MISS. CODE ANN., 1942, § 2666(c) (Recomp. Vol. 1956):

§ 2666. *Vagrants, who are.*

The following persons are and shall be punished as vagrants, viz.:

* * * * *

(c) All persons able to work, having no property to support them, and who have no visible or known means of a fair, honest and reputable livelihood. The term "visible and known means of a fair, honest and reputable livelihood," as used in this section, shall be construed to mean reasonably continuous employment at some lawful occupation for reasonable compensation, or a fixed and regular income from property or other investment, which income is sufficient for the support and maintenance of such person.

3. The case also involves the First, Fourteenth and Fifteenth Amendments to the Constitution of the United States.

Statement

This petition brings for review a judgment below denying federal habeas corpus. Petitioner seeks release from the custody of respondents, the County Attorney and Sheriff-Jailer of Lowndes County, Mississippi, who hold petitioner pursuant to Mississippi state vagrancy charges under MISS. CODE ANN. § 2666(c) (Recomp. Vol. 1956), set forth at p. 4 *supra*. The district court having denied the petition without return or hearing, the following allegations must be taken as true for purposes of review.[1]

The Council of Federated Organizations (COFO) is an association of civil rights and local citizenship groups working in Mississippi to achieve, by peaceful and lawful means, the equal civil rights of Negroes and all persons and, particularly, to educate, assist and encourage Negroes to register and vote in local, state and national elections free of racial discrimination (Petition, Appendix II *infra*, 16a). Now and during many years past, the county registrar of Lowndes County, Mississippi, has denied and is denying Negroes the right to register to vote by reason of race, in violation of the Fourteenth and Fifteenth Amendments and 42 U. S. C. A. § 1971 (1964); 42 U. S. C. §§ 1983, 1985 (1958). In 1961, the voting age population of Lowndes County was 16,460 white and 8362 Negro; there were 5869 registered white voters and 63 registered Negro voters; these figures have not substantially changed (21a).[2] One of COFO's pur-

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[1] The petition is set out in its entirety in Appendix III hereto, pp. 15a-26a *infra*.

[2] The Government has brought suit against the registrar of Lowndes County and others to enjoin these discriminatory practices. *United States* v. *Mississippi*, 229 F. Supp. 925 (S. D. Miss. 1964), *rev'd*, 380 U. S. 128 (1965).

poses is to educate, assist and encourage Negro citizens and residents of Lowndes County to register to vote (16a).

Petitioner is a 21-year-old white girl, a New York domiciliary and a college graduate, employed full-time by COFO as a voter registration worker (16a). Her duties for COFO include: interviewing Negro citizens of Mississippi for the purpose of educating, encouraging and assisting them to register to vote; accompanying such Negroes to the place of voting registration for the purpose of supporting their efforts to register free of racial discrimination; observing conduct by state officials or other persons calculated to racially disfranchise Negroes in violation of the Fourteenth and Fifteenth Amendments; and participating in the administrative activities of COFO's voter registration program (16a-17a). In return for her services, COFO supplies her decent lodgings (in the home of a well-known, respected retired Negro minister in Columbus, Mississippi), meals, support, maintenance, and reasonable livelihood, including all things necessary to sustain her as a reputable member of the community (17a). In addition, petitioner receives from her mother in New York sufficient money to meet all her needs (18a).

December 28, 1964, in the course of her COFO employment, petitioner, with two COFO co-workers, was present in the county courthouse for Lowndes County, assisting Negro voter registration applicants by: (1) directing them to the voter registration office; (2) supporting them, by her presence as an observer, against intimidation and harassment; and (3) interviewing them after their attempts to register, for the purpose of ascertaining whether the registrar was obstructing their attempts to register (18a). While conducting themselves in these activities in a peace-

ful and orderly manner, the three workers were arrested by a deputy sheriff who had been informed that they were COFO workers (18a-19a). Charged with vagrancy, petitioner offered to show the arresting officer money and a "vagrancy form" prepared by COFO against such a contingency, which stated that petitioner was a COFO employee. The officer refused to look at the form and held them for vagrancy (19a-20a). The following day an authorized COFO agent went to the County Attorney and informed him: that petitioner was a New York domiciliary, a college graduate, a COFO employee; that by arrangement of COFO she lived without expense to herself in the home of a well-known and respected retired Negro minister in the same town where she was arrested and held; that COFO supplied petitioner all her meals and necessaries. The COFO agent also showed the County Attorney a telegram dated that morning from petitioner's mother in New York, stating that the mother had assumed and would continue to assume full responsibility for providing her daughter all her decent needs as a respectable member of the community in Mississippi or elsewhere. Respondent County Attorney nevertheless persisted in holding and prosecuting petitioner on the entirely unfounded charge of vagrancy (20a-21a).

Consequently, on January 5, 1965, in advance of her state trial, petitioner filed by counsel a petition for writ of habeas corpus, challenging the Mississippi vagrancy statute on its face and as applied to her, as violative of her federal rights of free speech, association and assembly, her federal privilege to assist Negroes to register to vote in federal elections, and her federal guarantee against harassment designed and effective to deter Negro voting registration. She alleged that the prosecution was in furtherance of an official state-wide policy of discrimination against

Negroes and disfranchisement of Negroes by reason of race (22a-24a). She further asserted that she had been arrested without probable cause and that she was being detained in a jail segregated by force of Mississippi statute (23a). The United States District Court for the Northern District of Mississippi denied the petition on its face on the ground that petitioner had not exhausted her Mississippi state remedies as required by *Application of Wyckoff*, 196 F. Supp. 515 (S. D. Miss. 1961), 6 RACE RELATIONS L. RPTR. 786, *petition for immediate hearing and for leave to proceed on original papers denied*, id. at 793 (5th Cir. 1961), *petition for habeas corpus denied*, id. at 794 (Circuit Justice Black, with whom Mr. Justice Clark concurs, 1961); and *Brown* v. *Rayfield*, 320 F. 2d 96 (5th Cir. 1963), *cert. denied*, 375 U. S. 902 (1963) (1a). In so holding, the court rejected petitioner's contention—the principal issue in this case—that exhaustion of state remedies is not required in petitioner's circumstances.

January 5, 1965, the order denying the petition was entered; District Judge Clayton granted petitioner's application for a certificate of probable cause under 28 U. S. C. § 2253 (1958), and petitioner's notice of appeal was filed. January 22, 1965 the Court of Appeals for the Fifth Circuit granted petitioner's motion for leave to docket the appeal and proceed on verified copies of the papers comprising the record below, and set the case specially for expedited hearing on typwritten briefs. Such briefs were filed and the case was argued February 2, 1965.[3] August 16, 1965, the order of the District Court was affirmed by a panel of the Circuit

[3] For the information of the Court, District Judge Clayton made informal arrangements with the appellees for petitioner Hillegas' release from physical confinement, and for the stay of her state trial, pending the appellate proceedings in this case. Nothing of this appears in the record.

Court. The majority opinion, by Judge Jones joined by District Judge Sheehy, held that the decisions in *Wyckoff* and *Brown* v. *Rayfield, supra,* controlled this case (Opinion, Appendix II *infra,* 2a). Judge Brown, concurring under the compulsion of *Brown* v. *Rayfield,* pointed out that *Wyckoff* was inapposite both to *Brown* v. *Rayfield* and to the present case (6a-7a), noted that *Brown* v. *Rayfield,* "the victim of inadequate presentation" (4a), incorrectly followed *Wyckoff,* and, upon careful examination of statutory and judicial history first presented to a federal appellate court in petitioner's brief in the present case (6a) and upon analysis of decisions of this Court subsequent to *Brown* v. *Rayfield* (9a-11a), concluded that the latter decision was wrong and should be overruled (4a, 11a).

Petitioner thereupon applied for rehearing *en banc.* September 27, 1965, pursuant to Fifth Circuit practice, the application was denied by the panel which had heard the appeal.

Reasons for Granting the Writ

I.

The Case Presents an Important Issue Respecting the Federal Judicial Power and Obligation to Protect Civil Rights, Not Heretofore Decided by This Court.

This case raises a question of cardinal importance involving the relation of state and federal courts under the Supremacy Clause of the Constitution and the national habeas corpus jurisdiction created by Congress in 1867 and now codified in 28 U. S. C. § 2241(c)(3) (1958). That question is whether a federal district court empowered to discharge state prisoners "in custody in violation of the Constitution or laws . . . of the United States," *ibid.,* can and

should decline to entertain, pending state court trials and appeals, a factually detailed application for habeas corpus by a prisoner who alleges that she is confined under mesne process of a state criminal court in a prosecution which is groundless because aimed at punishing conduct protected by the First and Fourteenth Amendments, a prosecution whose design and effect are to harass and intimidate the prisoner and others similarly situated so as to repress their exercise of federal freedoms of expression to encourage Negro voter registration in a state which has unconstitutionally disfranchised the Negro.

A more important question can hardly be imagined. Upon its correct disposition depends in large measure the power and obligation of the federal district courts throughout the country to protect individuals from state prosecutions which are used as instruments to repress them and deprive them of their federally guaranteed freedoms. Surely, as this Court has recently recognized, "The assumption that defense of a criminal prosecution will generally assure ample vindication of constitutional rights is unfounded in such cases," *Dombrowski* v. *Pfister,* 380 U. S. 479, 486 (1965); prosecution is itself a potent weapon for the destruction of constitutional liberties, *cf. Dilworth* v. *Riner,* 343 F. 2d 226, 231-232 (5th Cir. 1965); thus, reversal of a state criminal conviction by the Supreme Court of the United States or a post-conviction federal habeas corpus court comes after the damage has been done. See *Cox* v. *Louisiana,* 348 F. 2d 750 (5th Cir. 1965). Amsterdam, *Criminal Prosecutions Affecting Federally Guaranteed Civil Rights: Federal Removal and Habeas Corpus Jurisdiction to Abort State Court Trial,* 113 U. Pa. L. Rev. 793, 794-805, 828-842 (1965). Due implementation of the Supremacy Clause requires

federal judicial intervention to terminate such state prosecutions in their inception.

It is petitioner-appellant's contention that the Congress of the United States recognized this truth following the Civil War, and, between 1866 and 1875, gave the federal courts of first instance ample jurisdiction to do the job. The three essential jurisdictional grants were the habeas corpus statute of 1867 involved in the present case; the civil rights removal statute of 1866, extended in 1875, now 28 U. S. C. § 1443 (1958), see *Rachel* v. *Georgia,* 342 F. 2d 336 (5th Cir. 1965) *cert. granted* October 11, 1965; and the grant of civil rights equitable jurisdiction in 1871, now 28 U. S. C. § 1343 (1958).

Post-Reconstruction judicial decisions treated the three jurisdictional grants with scant hospitality. Heedless of the congressional design to employ federal judicial power for the effective vindication of civil rights, this Court in *Douglas* v. *City of Jeannette,* 319 U. S. 157 (1943), disallowed federal injunction of state prosecutions which infringed First Amendment freedoms. The Court had already given a narrow reading to the civil rights removal statute in a line of decisions from *Virginia* v. *Rives,* 100 U. S. 313 (1880), to *Kentucky* v. *Powers,* 201 U. S. 1 (1906); and, in the same spirit, had shackled the imperative process of the federal writ of habeas corpus by the doctrine of exhaustion of state remedies, invented out of whole cloth in *Ex parte Royall,* 117 U. S. 241 (1886). But these constraining judicial inventions could withstand neither the scrutiny of historical study directed to the purposes of the Reconstruction legislation nor the demands of a federalism characterized by national commitment to the protection of individual liberties. In *Baggett* v. *Bullitt,* 377 U. S. 360 (1964),

and *Dombrowski* v. *Pfister*, 380 U. S. 479 (1965), the Court substantially repudiated the bases of *Douglas* v. *City of Jeannette;* in *Georgia* v. *Rachel*, No. 147, it has granted *certiorari* to reexamine the scope of the civil rights removal jurisdiction; and in *Fay* v. *Noia*, 372 U. S. 391, 416 (1963), it explicitly recognized the inconsistency of the exhaustion doctrine, in at least some of its latter-day extensions, with the congressional intendment of the habeas corpus jurisdiction.

The present proceeding was brought to test the application of the exhaustion doctrine to civil rights cases in light of the historical insight of *Fay* v. *Noia*. No better case for the purpose could be found. Under the allegations of the petition, which the courts below accepted as true, petitioner is being prosecuted in a Mississippi state court for conduct plainly protected by the First Amendment, the design and effect of the prosecution being to harass and intimidate her and others similarly situated so as to coerce them to forego exercise of vital federal freedoms. Nevertheless, the District Court and the Court of Appeals (one judge disagreeing) denied relief on the sole ground of failure to exhaust state remedies. An informal arrangement by the District Judge stayed the state prosecution pending appellate proceedings and thus guaranteed the appeal against mootness[4]—a constant danger to federal appellate review in this sort of pretrial habeas corpus proceeding. (Needless to say, such arrangements will not likely be made in the future should the Court decline to review the present case.) Petitioner has presented to the Court of Appeals, and will present to this Court, historical materials not previously available and which are indispensable to a

[4] See note 3 *supra*.

just appreciation of the congressionally intended scope and function of federal habeas corpus. Moreover, the time is now especially propitious for disposition of the exhaustion question by this Court. The Court now has before it on *certiorari* questions concerning the scope of the civil rights removal jurisdiction; the removal legislation of 1866 and the habeas corpus legislation of 1867 have a common history and are intimately related parts of a federal judicial remedial scheme. Full canvass of the issues concerning anticipatory federal jurisdiction in state criminal prosecutions affecting civil rights, and an appropriate disposition of those issues in view of the full range of alternative forms of federal process, can be assured only if *certiorari* is granted here and this case heard in conjunction with the civil rights removal cases.

This Court has not discussed the application of the doctrine of exhaustion of state remedies to a case in which petition for federal habeas corpus was made prior to state trial for almost sixty years, see *United States ex rel. Drury* v. *Lewis,* 200 U. S. 1 (1906), and has never discussed the application of the doctrine to a harassment prosecution threatening First Amendment freedoms and the equal civil rights of Negroes—prime concern of the Reconstruction Congress which enacted the habeas corpus legislation. The questions are pressing ones today; the implication of *Fay* v. *Noia* for those questions is unclear; these considerations, petitioner submits, make the present case an appropriate one for the exercise of the Court's *certiorari* jurisdiction.

II.

The Decision Below Is Wrong and Seriously Impairs Federal Judicial Power to Protect National Civil Rights.

A.

Federal Habeas Corpus Courts Are Empowered to Discharge From Mesne Restraints Petitioners Held to Answer Unconstitutional State Prosecutions.

The national habeas corpus statute, 28 U. S. C. § 2241 (c)(3) (1958), authorizes federal courts to discharge on habeas corpus state prisoners "in custody in violation of the Constitution or laws . . . of the United States." It is well settled that the section empowers release before trial of persons detained on state criminal charges which the State cannot constitutionally apply to their conduct. *Wildenhus's Case*, 120 U. S. 1 (1887); *In re Loney*, 134 U. S. 372 (1890); *In re Neagle*, 135 U. S. 1 (1890); *Hunter* v. *Wood*, 209 U. S. 205 (1908); *Ex parte Royall*, 117 U. S. 241, 245-250 (1886) (dictum); *Cook* v. *Hart*, 146 U. S. 183, 194-195 (1892) (dictum); *Whitten* v. *Tomlinson*, 160 U. S. 231, 241-242 (1895) (dictum); *Baker* v. *Grice*, 169 U. S. 284, 290 (1898) (dictum); *United States ex rel. Drury* v. *Lewis*, 200 U. S. 1, 6-8 (1906) (dictum).

B.

Petitioner's Prosecution Is Unconstitutional.

The state statute under which this petitioner is charged cannot constitutionally be applied to petitioner's conduct for several reasons:

(1) If Miss. Code Ann. § 2666(c) (Recomp. Vol. 1956), set out at p. 4 *supra*, makes it criminal to work in a

courthouse for COFO as a voter registration worker, receiving from COFO adequate lodging and food and from petitioner's parents all additional money required to meet petitioner's needs (with assurance of further funds both from COFO and from petitioner's mother should they be needed), then the statute abridges petitioner's freedom of speech (see *Thomas* v. *Collins*, 323 U. S. 516 (1945); *Staub* v. *Baxley*, 355 U. S. 313 (1958); *N. A. A. C. P.* v. *Button*, 371 U. S. 415 (1963); *Brotherhood of Railroad Trainmen* v. *Virginia ex rel. Virginia State Bar*, 377 U. S. 1 (1964), holding that organizational activity like petitioner's is protected speech), freedom to associate with COFO (see, e.g., *N. A. A. C. P.* v. *Alabama*, 357 U. S. 449 (1958); *Bates* v. *Little Rock*, 361 U. S. 516 (1960); *Shelton* v. *Tucker*, 364 U. S. 479 (1960); *Gibson* v. *Florida Legislative Investigating Committee*, 372 U. S. 539 (1963), striking down lesser impediments than absolute prohibition with respect to associations like COFO), and freedom to assemble in the courthouse with Negro voting registration applicants and other COFO workers for the purpose of giving the applicants support (this is *a fortiori* from *Edwards* v. *South Carolina*, 372 U. S. 229 (1963); *Fields* v. *South Carolina*, 375 U. S. 44 (1963); *Henry* v. *Rock Hill*, 376 U. S. 776 (1964); *Cox* v. *Louisiana*, 379 U. S. 536 (1965)). It also abridges petitioner's Fourteenth Amendment privilege to assist, encourage and educate Negro citizens to register to vote in federal elections (see *Hague* v. *C. I. O.* 307 U. S. 496 (1939) (opinion of Mr. Justice Roberts)) and the Fourteenth Amendment privilege of those Negroes to register to vote in federal elections (cf. *United States* v. *Classic*, 313 U. S. 299 (1941)), as well as their Fifteenth Amendment freedom to register to vote in all elections free of racial discrimination (cf. *United States* v. *Raines*, 362 U. S. 17 (1960)). If the statute does not apply to the state of facts

described in the first paragraph, then there is no factual basis whatever for the charge against petitioner, and her punishment under the statute deprives her of due process of law for that reason. *Thompson* v. *Louisville*, 362 U. S. 199 (1960); *Garner* v. *Louisiana*, 370 U. S. 157 (1961); *Fields* v. *Fairfield*, 375 U. S. 248 (1963); *Barr* v. *Columbia*, 378 U. S. 146 (1964).

(2) Application of the statute to petitioner is also precluded because the design and effect of this prosecution is to enforce a policy of racial discrimination by public officials of the State of Mississippi in violation of the Fourteenth and Fifteenth Amendments and 42 U. S. C. A. § 1971 (1964); 42 U. S. C. §§ 1983, 1985 (1958). See *Dombrowski* v. *Pfister*, 380 U. S. 479 (1965). It is immaterial that the policy is not expressed in Miss. Code Ann. § 2666 (c) (Recomp. Vol. 1956) itself. See *Peterson* v. *Greenville*, 373 U. S. 244 (1963); *Lombard* v. *Louisiana*, 373 U. S. 267 (1963); *Robinson* v. *Florida*, 378 U. S. 153 (1964). The policy pervades Mississippi's statute books as well as its public life. See, e.g., Miss. Const., art. 8, §§ 201, 205, 207; art. 10, § 225; art. 12, §§ 241-A, 244; Miss. Code Ann. §§ 2056(7), 2339, 4065.3 (Recomp. Vols. 1956); Miss. Laws, 1st Extra. Sess. 1962, chs. 4, 9, 16, 20.

(3) Finally, Miss. Code Ann. § 2666(c) (Recomp. Vol. 1956) is on its face void for vagueness in that it makes criminality of a salaried person turn on whether the salary amounts to "reasonable compensation." See cases cited in Note, 109 U. Pa. L. Rev. 67, 92-93 (1960), particularly *United States* v. *L. Cohen Grocery Co.*, 255 U. S. 81 (1921), and *Cline* v. *Frink Dairy Co.*, 274 U. S. 445 (1927). Such indefiniteness in a criminal statute is unallowable under

the Fourteenth Amendment, at least where greater definiteness is practicable (as it obviously is here: compare the provision of § 2666(c) applicable to persons having an income from property or investment, which requires that the income be "sufficient for . . . support and maintenance"). The limited inroad into *Cohen* made by *United States* v. *National Dairy Prods. Co.*, 372 U. S. 29 (1963), expressly distinguishing *Cohen*, 372 U. S. at 36, does not save the statute, since it operates in the First Amendment area, see, e.g., *N. A. A. C. P.* v. *Button*, 371 U. S. 415 (1963); *Wright* v. *Georgia*, 373 U. S. 284 (1963); *Bouie* v. *Columbia*, 378 U. S. 347 (1964).

C.

A Federal Habeas Corpus Applicant in Petitioner's Situation Is Not Required to Exhaust State Judicial Remedies.

Since petitioner is thus in custody in violation of the Constitution, the only obstacle to her release on habeas corpus in advance of state trial is the doctrine of exhaustion of state remedies. Petitioner has not, and contends she need not, exhaust Mississippi state remedies on the facts of this case; the District Court and the Fifth Circuit held that *Application of Wyckoff* and *Brown* v. *Rayfield*[5] obliged her to do so. Plainly, the evolution of the exhaustion doctrine

[5] Application of Wyckoff, 196 F. Supp. 515 (S. D. Miss. 1961), 6 Race Relations L. Rptr. 786, petition for immediate hearing and for leave to proceed on original papers denied, *id.* at 793 (5th Cir. 1961), petition for habeas corpus denied, *id.* at 794 (Circuit Justice Black, with whom Mr. Justice Clark concurs); Brown v. Rayfield, 320 F. 2d 96 (5th Cir. 1963), cert. denied, 375 U. S. 902 (1963).

by the Fifth Circuit, from *Wyckoff* to *Brown* v. *Rayfield* to the present case,* carries the doctrine far beyond any of this Court's decisions, and abuts at a result which entirely perverts the habeas corpus legislation enacted by Congress.

(1) *Wyckoff*, *Brown* v. *Rayfield* and 28 U. S. C. § 2254.

In *Wyckoff* the petitioner, a freedom rider, was convicted by an Ex Officio Justice of the Peace of Hinds County, Mississippi, of breach of the peace (congregating with others with intent to provoke a breach of the peace and refusing to move on at the lawful order of a peace officer), arising out of her attempt, with other freedom riders, to integrate the bus terminal waiting room in Jackson. She was sentenced to $200 fine and two months imprisonment, the imprisonment sentence suspended. Under Mississippi law, her conviction could be appealed for trial *de novo* before a jury in the County Court, and from conviction by the County Court an appeal lay to the Circuit Court, thence to the Supreme Court of Mississippi. Mississippi statutes allowed the appeals without cost or bond on proper filing of a pauper's oath. Petitioner, who was represented by retained counsel at the justice's trial, did not appeal. Within the period for appeal she filed a federal habeas corpus petition, asserting that the conduct for which she had been convicted was protected, *inter alia*, by the First and Fourteenth Amendments, that the prosecution was brought to enforce racial segregation in violation of the Equal Protec-

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* The present case involves an extension of the exhaustion requirement beyond that imposed in *Wyckoff* and *Brown* v. *Rayfield*, for the reasons set out at pp. 53-57 *infra*.

tion Clause of the Fourteenth Amendment, and that she had been denied a federally guaranteed right of jury trial in the justice court. She further alleged that she was unable to bear the cost of taking state appeals. The respondent's return denied that the purpose of the prosecution was to enforce racial segregation, alleged that the trial and conviction were fair and regular, and asserted that state remedies were not exhausted as required by 28 U. S. C. § 2254 (1958). After hearing, the district court denied the petition on the ground of failure to exhaust state remedies, holding that the record in the justice court showed that petitioner had waived jury trial, pointing out that petitioner still had an available appeal for trial *de novo* in the County Court, and noting that Mississippi provided a pauper's procedure for taking the appeal and that petitioner was represented by able counsel. Because the respondent's return had denied that the prosecution was designed to enforce unconstitutional segregation and petitioner had offered no evidence in support of her allegations to this effect, the district court took petitioner's claims in this respect as unproved. Petitioner noted an appeal and asked the Fifth Circuit for leave to proceed on the original papers and for an immediate hearing. The court denied both motions, agreeing with the district court that petitioner had failed to exhaust state remedies under 28 U. S. C. § 2254.

In *Brown* v. *Rayfield,* the two habeas petitioners were arrested while walking in tandem, in an orderly fashion, with four other individuals, on a street in Jackson, Mississippi, carrying an American flag and a placard protesting racial discrimination. Charged with violation of a Jackson ordinance prohibiting parading without a license, they were entitled to trial in a justice court and thereafter to appeals

as in *Wyckoff*. Apparently prior to their justice trial,[1] they petitioned for federal habeas corpus, asserting that the conduct for which they were charged could not consistently with the First and Fourteenth Amendments be punished by the State. Petitioners undertook to state a case of "circumstances rendering [state remedies] . . . ineffective to protect [their] . . . rights" within 28 U. S. C. § 2254 by allegations (a) that all Mississippi public officials were committed to a policy of racial discrimination, as demonstrated by Mississippi's massive resistance legislation; (b) that judges of the various state courts (all elected officials) gave tacit if not open support to the discriminatory policy in their election campaigns, and that the policy was reflected in their judicial decisions and opinions; and (c) that, by reason of the congestion of civil rights cases in the Mississippi courts, and delays compelled by Mississippi trial and appellate procedures, the June 1961 freedom rider cases had not yet been disposed of by the Mississippi Supreme Court in the summer of 1963, and a like or greater delay was in prospect for the petitioners. The return denied that the Mississippi courts would not fairly protect petitioners' federal rights, and asserted that § 2254 precluded entertaining the petitions. The district court denied relief on this ground; pending appeal the petitioners posted bond and were released from jail; the Fifth Circuit, relying on the *Wyckoff* decision, dismissed the appeals for insubstantiality on the merits.

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[1] The Fifth Circuit opinion in *Brown* v. *Rayfield* does not make clear whether the federal habeas corpus application in that case was filed prior to or after the justice trial; language in the opinion suggests the latter. However, Judge Brown's concurring opinion in the present case, based upon examination of the *Brown* v. *Rayfield* record, indicates that *Brown* was a pretrial habeas case.

Any evaluation of *Brown* v. *Rayfield* must begin with the observation that the court there quite erroneously supposed the case was governed by 28 U. S. C. § 2254. That statute has no application whatever to federal habeas corpus petitions filed in advance of a state court trial. The section applies only to "a person in custody pursuant to the judgment of a State court," and the legislative history makes clear what in any event would be apparent (e.g., by comparison of this language with that of 28 U. S. C. § 2253 (1958)): that the phrase "judgment of a State court" was chosen to cover post-conviction habeas cases and to exclude cases in which federal habeas corpus was sought prior to state trial. The original section in the House bill which became the 1948 Judicial Code required exhaustion of available state remedies by a habeas petitioner who was "in custody pursuant to the judgment of a State court or authority of a State officer." See H. R. 3214, 80th Cong., § 2254. The Senate Committee on the Judiciary rewrote the section to make several changes, among them omission of the phrase "or authority of a State officer." The committee report explains the purpose of the change to ". . . . eliminate from the prohibition of the section applications on behalf of prisoners in custody under authority of a State officer but whose custody has not been directed by the judgment of a State court. If the section were applied to applications by persons detained solely under authority of a State officer it would unduly hamper Federal courts in the protection of Federal officers prosecuted for acts committed in the course of official duty." Sen. Rep. No. 1559, 80th Cong., 2d Sess. 9 (1948). Moreover, the origins of this 1948 statute, disclosing the concerns to which it responded, make patent that § 2254 has not even analogical significance in pretrial habeas cases. See Amsterdam, *Criminal Prose-*

cutions Affecting Federally Guaranteed Civil Rights: Federal Removal and Habeas Corpus Jurisdiction to Abort State Court Trial, 113 U. Pa. L. Rev. 793, 890 n. 415, 902-903 (1965). Accepting *arguendo* the decision in *Wyckoff* that § 2254 applies to a prisoner confined under a justice court conviction notwithstanding state law gives him a right of trial *de novo* in a court of record, the statute plainly had no application to the pre-justice-trial petition filed in *Brown* v. *Rayfield* and the present case.

Of course, § 2254 is merely a partial codification of the doctrine of exhaustion of state remedies, which was judicially developed in and following *Ex parte Royall*, 117 U. S. 241 (1886), and which, as a flexible judicial doctrine of comity, does apply to pretrial federal habeas petitions. See in addition to *Royall*, e.g., *Cook* v. *Hart*, 146 U. S. 183 (1892); *New York* v. *Eno*, 155 U. S. 89 (1894); *Whitten* v. *Tomlinson*, 160 U. S. 231 (1895); *Moss* v. *Glenn*, 189 U. S. 506 (1903); *United States ex rel. Drury* v. *Lewis*, 200 U. S. 1 (1906). The origin and scope of that judicially developed doctrine in relation to the function of federal habeas corpus in civil rights cases is considered in the ensuing sections of this petition; for present purposes it is sufficient to note that the doctrine is a judicial creature, unfettered by statute against judicial evolution, and which "prescribes only what should 'ordinarily' be the proper procedure; all the cited cases from *Ex parte Royall* to [Ex parte] *Hawk* [321 U. S. 114 (1944)] recognize that much cannot be foreseen, and that 'special circumstances' justify departure from rules designed to regulate the usual case. The exceptions are few but they exist. Other situations may develop. . . . " *Darr* v. *Burford*, 339 U. S. 200, 210 (1950) (dictum). See, e.g., the authorities cited at p. 14, *supra*.

To determine the appropriate application of the judicial doctrine to such cases as the present one and *Brown* v. *Rayfield*, it will be necessary to canvass the statutory history of federal habeas corpus jurisdiction and the evolution of the court-made exhaustion requirement in relation to it. From such a survey the conclusion clearly emerges that federal habeas corpus is immediately available to one in petitioner's circumstances.

(2) *Legislative history.*

Habits of thought generated by three quarters of a century of application of the exhaustion doctrine tend to make American courts and lawyers today think of federal habeas corpus almost exclusively as a post-conviction remedy. But the nineteenth century Congresses which expanded the habeas corpus jurisdiction to its present scope[8] thought in no such terms. Prior to the twentieth century, post-conviction use of the writ was rare though not unknown;[9] the English courts had more frequently used the writ in its various forms "for removing prisoners from one court

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[8] The present federal habeas corpus jurisdiction described in 28 U. S. C. § 2241 (1958), is the product of statutes of 1789, 1833, 1842 and 1867. Act of September 24, 1789, ch. 20, § 14, 1 Stat. 73, 81-82; Act of March 2, 1833, ch. 57, 4 Stat. 632; Act of August 29, 1842, ch. 257, 5 Stat. 539-540; Act of February 5, 1867, ch. 28, 14 Stat. 385. Each succeeding statute added to the previously given grant of habeas power. The four grants were consolidated without substantial change in Rev. Stat. §§ 751-753, which remained in force without significant modification until the 1948 revision of Title 28, U. S. C. That revision produced present § 2241, whose "changes in phraseology" were not designed to affect substantive change. See Revisor's Note to 28 U. S. C. § 2241 (1958).

[9] Examination of the texts clearly indicates that in England the writ was most commonly used, and thought of, as pretrial, not post-conviction, process. E.g., 3 COMYNS. DIGEST OF THE LAWS OF ENGLAND 454-455 (1785); 2 HALE, PLEAS OF THE CROWN 143-

into another, for the more easy administration of justice";[10] common-law habeas corpus ad subjiciendum developed principally as a remedy against executive detention without, or prior to, judicial trial;[11] and the great Habeas Corpus Act of 1679, 31 Charles II, ch. 2, as Blackstone noted, extended by its terms "only to the case of commitments for such criminal charge, as can produce no inconvenience to public justice by a temporary enlargement of the prisoner; all other cases of unjust imprisonment being left to the

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148, 210-211 (1st American ed., Philadelphia, 1847); IV BACON'S ABRIDGMENT 563-605, Habeas Corpus (Philadelphia 1844). One of the relatively infrequent instances of its post-conviction use is the celebrated Bushell's case, Vaughan, 135, 6 How. St. Tr. 999, 124 Eng. Rep. 1006 (1670), discharging petitioners from a contempt commitment. Several of the precedents cited in Bushell's case involve similar summary commitment. In this country, the Supreme Court of the United States early employed the federal writ in behalf of persons committed for trial, to release them on bail, United States v. Hamilton, 3 Dall. 17 (U. S. 1795), or to discharge them for want of probable cause, Ex parte Bollman, 4 Cranch 75 (1807); but in Ex parte Watkins, 3 Pet. 193 (1830), the Court held that where the respondent's return to the writ showed that the petitioner was held by virtue of the judgment of a court having jurisdiction, the inquiry on habeas corpus ended and no reexamination would be made of the lawfulness of the judgment. *Watkins* thus restricted post-conviction use of habeas corpus to a very narrow compass; it was only with Ex parte Lange, 18 Wall. 163 (1873), that expansion began via the "jurisdictional" fiction, and only with Johnson v. Zerbst, 304 U. S. 458 (1938) that federal habeas emerged from the fiction in its modern role as a post-conviction remedy. See note 14 *infra*. The state courts, too, generally disallowed postconviction use of the writ prior to the twentieth century. See cases collected in Thompson, *Abuses of the Writ of Habeas Corpus*, 18 AM. L. REV. 1, 17-18 n. 1 (1884). See also Oaks, *Habeas Corpus in the States*, 32 U. CHI. L. REV. 243, 258-264 (1965).

[10] 3 BLACKSTONE COMMENTARIES 129 (6th ed., Dublin 1775). Blackstone here refers to forms of the writ other than *habeas corpus ad subjiciendum*.

[11] See 9 HOLDSWORTH, A HISTORY OF ENGLISH LAW 111-119 (1926).

habeas corpus at common law."[13] Consistently with this background, the several congressional statutes extending federal habeas corpus to state prisoners[15] were clearly designed, in the classes of cases with which each was principally concerned, to give prisoners held by state authorities in advance of state court proceedings an immediate federal judicial proceeding to secure their release.[14] The history of the first two of these enactments, in 1833 and 1842, was carefully examined in *In re Neagle*, 135 U. S. 1, 70-75 (1890), and the conclusion drawn that their whole purpose was to allow federal judicial intervention into the state criminal process before state court trial. Indeed, no other conclusion is possible. The Force Act of March 2, 1833, ch. 57, 4 Stat. 632, was Congress' response to John C. Calhoun and his threat to take South Carolina out of the Union

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[13] 3 BLACKSTONE, *supra* note 10, at 137. For the history of the act see 9 HOLDSWORTH, *supra* note 11, at 115-119; CHAFEE, HOW HUMAN RIGHTS GOT INTO THE CONSTITUTION 51-64 (1952).

[15] The habeas corpus jurisdiction given by the First Judiciary Act by its express terms did not extend to state prisoners except where they were "necessary to be brought into court to testify." Act of September 24, 1789, ch. 20, § 14, 1 Stat. 73, 81-82.

[14] The conclusion in note 9 *supra* that development of federal habeas corpus as a post-conviction remedy may be dated at the earliest from 1873 and is largely a twentieth century phenomenon is supported by all commentators. See, e.g., Fay v. Noia, 372 U. S. 391 (1963); *Note, The Freedom Writ—The Expanding Use of Federal Habeas Corpus*, 61 HARV. L. REV. 657 (1948); *Hart, Foreword, The Supreme Court, 1958 Term*, 73 HARV. L. REV. 84, 101-121 (1959); *Reitz, Federal Habeas Corpus: Postconviction Remedy for State Prisoners*, 108 U. PA. L. REV. 461 (1960); *Reitz, Federal Habeas Corpus: Impact of an Abortive State Proceeding*, 74 HARV. L. REV. 1315 (1961); *Brennan, Federal Habeas Corpus and State Prisoners: An Exercise in Federalism*, 7 UTAH L. REV. 423 (1961); *Bator, Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 HARV. L. REV. 441 (1963); *Note, Federal Habeas Corpus for State Prisoners: The Isolation Principle*, 39 N. Y. U. L. REV. 78 (1964).

in resistance to the Tariff. See 1 MORISON & COMMAGER, GROWTH OF THE AMERICAN REPUBLIC 475-485 (4th ed. 1950); *Fay* v. *Noia*, 372 U. S. 391, 401 n. 9 (1963). The Nullification Ordinance was an open denial of federal supremacy, and it was "apparent that the constitution of the courts in South Carolina makes it necessary to give the revenue officers the right to sue in the federal courts." Cong. Debates, vol. 9, pt. 1, 260 (Mr. Wilkins, who reported the bill and was its floor manager in the Senate, *id.* at 150 (1/21/33), 246 (1/28/33, 1/29/33)); see also Mr. Frelinghuysen's remarks, *id.* at 329-332 (2/2/33). Hence Congress responded by extending the civil jurisdiction of the federal courts to all cases arising under the revenue laws (§ 2), by authorizing removal of civil and criminal cases against federal revenue officers (§ 3), and by giving the federal courts and judges habeas corpus power to discharge from state custody all persons "in jail or confinement, where he or they shall be committed or confined on, or by any authority or law, for any act done, or omitted to be done, in pursuance of a law of the United States, or any order, process, or decree, of any judge or court thereof. . . ." (§ 7, 4 Stat. 634). The clear purpose of these provisions as a lot was wholly to supersede state court jurisdiction in cases affecting the tariff and to give the federal courts power immediately and effectively to enforce the tariff against concerted state resistance, including state judicial resistance. Similarly, the Act of August 29, 1842, ch. 257, 5 Stat. 539-540, was designed to cope with the problem of the famous *McLeod* case, in which the New York courts nearly touched off a major international incident by refusing to relinquish jurisdiction over a British subject held for murder, who claimed that the acts with which he was charged were done under

authority of the British government. *People* v. *McLeod*, 25 Wend. 482 (Sup. Ct. N. Y. 1841). McLeod was acquitted at his trial, but the need for an expeditious federal remedy to abort the state court process in such cases was strongly felt, and the 1842 statute was its product. See the speech of Mr. Berrien, who introduced the Senate bill, Cong., Globe, 27th Cong., 2d Sess. 444 (4/26/42), quoted in *Neagle*, 135 U. S. at 71-72.

Thus the thirty-ninth Congress, which in 1867 further extended the federal habeas corpus jurisdiction to "all cases where any person may be restrained of his or her liberty in violation of the constitution, or of any treaty or law of the United States," acted against a background of legislative practice which had previously employed the federal writ to discharge individuals held for state trial, in advance of that trial, in cases where their detention for subjection to the state criminal process was itself destructive of federal interests that the state judicial proceedings could not be expected to vindicate. The Act of February 5, 1867, ch. 28, 14 Stat. 385, predecessor of the present 28 U. S. C. § 2241(c)(3) (1958), was Reconstruction legislation. Its first section granted new habeas corpus power in the language quoted above, made elaborate provision for summary hearing and summary disposition by the federal judges, and provided that:

> "... pending such proceedings or appeal, and until final judgment be rendered therein, and after final judgment of discharge in the same, any proceeding against such person so alleged to be restrained of his or her liberty in any State court, or by or under the authority of any State, for any matter or thing so heard and determined, under and by virtue of such

writ of habeas corpus, shall be deemed null and void." § 1, 14 Stat. 386."

Its second section gave another and different remedy to state criminal defendants having federal constitutional defenses: review of the highest state court judgment by the Supreme Court of the United States on writ of error. 14 Stat. 386-387. In view of the juxtaposition of these remedies, the provisions expressly recognizing that federal habeas corpus courts would anticipate and forestall state judicial processes, and the pre-1867 usage with the writ, one need hardly plumb the legislative debates to conclude, as this Court recently has concluded, that: "Congress seems to have had no thought . . . that a state prisoner should abide state court determination of his constitutional defense—the necessary predicate of direct review by [the Supreme Court] . . .—before resorting to federal habeas corpus. Rather, a remedy almost in the nature of *removal* from the state to the federal courts of state prisoners' constitutional contentions seems to have been envisaged." *Fay v. Noia*, 372 U. S. 391, 416 (1963). The legislative materials, moreover, are eloquent on the point.

The genesis of the statute was a resolution offered by Representative Shellabarger shortly after the convening of the Congress in December, 1865 and immediately agreed to by the House, Cong. Globe, 39th Cong., 1st Sess. 87 (12/19/65): "*Resolved*, That the Committee on the Judiciary be directed to inquire and report to this House, as soon as practicable, by bill or otherwise, what legislation is necessary to enable the courts of the United States to en-

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" The successor of this provision is present 28 U. S. C. § 2251 (1958), under which petitioner herein has moved for a stay of state proceedings.

force the freedom of the wives and soldiers of the United States under the joint resolution of Congress of March 3, 1865, and also to enforce the liberty of all persons under the operation of the constitutional amendment abolishing slavery." There is no pertinent "joint resolution" of "March 3, 1865," and the evidence is persuasive that the "March 3" action intended by the reference is the Act of March 3, 1863, ch. 81, 12 Stat. 755, a statute protecting Union officers and other persons from civil or criminal liability for acts or omissions during the rebellion under Presidential order or law of Congress, and authorizing removal from the state to federal courts of civil or criminal actions against such persons.[16] That this was Shellabarger's reference appears from the House Judiciary Committee's subsequent reporting of a bill[17] which became the Act of May 11, 1866, ch. 80, 14 Stat. 46, substantially amending the

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[16] *Bator, Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 HARV. L. REV. 441, 476 n. 80 (1963), reaches this conclusion. March 3, 1865 was the date of House concurrence in a Senate concurrent resolution requesting the President to transmit the proposed Thirteenth Amendment to the state executives, Cong. Globe, 38th Cong., 2d Sess. 1416 (3/3/65), but Shellabarger could not have meant to refer to this resolution, which had no substantive import. March 3, 1865 was also the date of enactment of the Freedmen's Bureau Act, ch. 90, 13 Stat. 507, but matters involving implementation of that act would doubtless have been referred to the House Select Committee on Freedmen, established by resolution, Cong. Globe, 39th Cong., 1st Sess. 14 (12/6/65), and which reported, for example, the Amendatory Freedmen's Bureau Act of July 16, 1866, ch. 200, 14 Stat. 173. See Cong. Globe, 39th Cong., 1st Sess. 2743 (5/22/66).

[17] The bill was apparently numbered H. R. 238 of the 39th Congress, although some pages of the Globe refer to it as H. R. 298. It was the product of a House Judiciary Committee amendment in the nature of a substitute to a bill introduced by Representative Welker. Introduced at Cong. Globe, 39th Cong., 1st Sess. 196 (1/11/66); reported, *id.* at 1368 (3/13/66); taken up, *id.* at 1387 (3/14/66).

removal procedures of the 1863 act to prevent their obstruction by the state courts,[18] an act which in turn was amended by the Act of February 5, 1867, ch. 27, 14 Stat. 385, authorizing the issuance of writs of habeas corpus cum causa by the federal courts to bring before them the bodies of defendants whose cases had been removed from the state courts under the 1863 removal provisions.[19] On March 15, 1866, in debate on the bill which became the May 11 act, Shellabarger returned to what appears the theme first sounded in his resolution of the preceding December:

> "Mr. SHELLABARGER. I wish to inquire of some member of the Judiciary Committee whether they intend by this bill, or any other which they may have in

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[18] See *id.* at 1387-1388 (Cook, who reported the bill, *id.* at 1368 (3/13/66), and was its floor manager, *id.* at 1387 (3/14/66), in the House, 3/14/66); 2054 (Clark, who reported the bill, *id.* at 1753 (4/4/66), and was its floor manager, *id.* at 1880 (4/11/66) in the Senate, 4/20/66).

[19] The act was reported by the Judiciary Committee in each house. *Id.* at 4096 (7/24/66) (House), 4116 (7/24/66) (Senate). Its purpose was to take from state custody defendants whose cases had been removed into the federal courts, *id.* at 4096 (7/24/66) (Wilson, who reported the bill and was its floor manager, *ibid.*, in the House); Cong. Globe, 39th Cong., 2d Sess. 729 (1/25/67) (Trumbull, chairman of the Judiciary Committee, who reported the bill, Cong. Globe, 39th Cong., 2d Sess. 729 (1/25/67) in the Senate), and thereby to permit the federal court to determine the validity of the defendant's detention under the arrest, *ibid.* (Johnson, in the Senate). Together with the Act of May 11, see *supra*, text at note 18, and the habeas corpus statute, this enactment evidences congressional concern to provide speedy and efficient federal judicial remedies for state court defendants. Contemporaneously with these three bills, the bill which was to become the First Civil Rights Act of April 9, 1866, ch. 31, 14 Stat. 27, was being processed through Congress. Section 3 of the act as enacted created the civil rights removal jurisdiction now found in 28 U. S. C. § 1443(2) (1958), and adopted the procedures of the 1863 removal sections with "all acts amendatory thereof." 14 Stat. 27.

preparation, to provide for such cases as one which I am about to describe, a case which came to my knowledge about the time of the convening of this Congress, and which I now state in order to attract to it the attention of the committee, as it is one of a very large class of similar cases.

"In Grant County, I believe, in the State of Kentucky, a provost marshal of the United States ordered certain citizens to take to the jail of that county two persons who were arrested and held as notorious guerrillas. While executing this order the persons in charge of these guerrillas, in order to prevent their attempted escape, were obliged to fire at them; and by that volley one of the guerrillas was killed and the other wounded. The persons who took part in that transaction have been indicted by the grand jury of the county for murder in the first degree; and one or two of them, in order to avoid trial and the conviction which they regarded as inevitable in that county, have been compelled to escape from the State." Cong. Globe, 39th Cong., 1st Sess. 1426 (3/15/66).

On July 25, 1866 Mr. Lawrence of Ohio reported from the House Judiciary Committee the bill which was subsequently to be enacted as the habeas corpus statute, ch. 28, of February 5, 1867. Questioned concerning a passage in the bill which excluded from its operation certain military prisoners, he said:

"Mr. LAWRENCE, of Ohio. I will explain. On the 19th of December last, my colleague [Mr. SHELLABARGER] introduced a resolution instructing the Judiciary Committee to inquire and report to the House as soon as practicable, by bill or otherwise, what legislation is

necessary to enable the courts of the United States to enforce the freedom of the wife and children of soldiers of the United States, and also to enforce the liberty of all persons. Judge Ballard, of the district court of Kentucky, decided that there was no act of Congress giving courts of the United States jurisdiction to enforce the rights and liberties of such persons. In pursuance of that resolution of my colleague this bill has been introduced, the effect of which is to enlarge the privilege of the writ of *habeas* [sic] *corpus*, and to make the jurisdiction of the courts and judges of the United States coextensive with all the powers that can be conferred upon them. It is a bill of the largest liberty, and does not interfere with persons in military custody, or restrain the writ of *habeas corpus* at all. I am satisfied there will not be a solitary objection to this bill if it is understood by the House." Cong. Globe, 39th Cong., 1st Sess. 4151 (7/25/66).

The bill passed the House without further explanation. *Ibid.* In the Senate, it was reported by Lyman Trumbull of Illinois, chairman of the Judiciary Committee, *id.* at 4228 (7/27/66). As in the House, the question was raised of the bill's exception of military prisoners from its scope, *id.* at 4229 (7/27/66) (Senator Davis of Kentucky), and Senator Trumbull replied:

" . . . I will state to the Senator from Kentucky which he is probably aware of, that the *habeas corpus* act of 1789, to which this bill is an amendment, confines the jurisdiction of the United States courts in issuing writs of *habeas corpus* to persons who are held under United States laws. Now, a person might be held

> under a State law in violation of the Constitution and laws of the United States, and he ought to have in such a case the benefit of the writ, and we agree that he ought to have recourse to United States courts to show that he was illegally imprisoned in violation of the Constitution or laws of the United States." *Ibid.*

This was the only discussion of the bill's substance in the upper house. The Senate passed it with a procedural amendment in which the House concurred without debate.[20]

Floor discussion of the act of 1867 was thus quite limited. But its proponents told the Congress all that seemed necessary when they explained its purpose to give "recourse to the United States courts" (Senator Trumbull, *supra*) in cases of federally illegal detention, and to expand the habeas corpus jurisdiction to its constitutional limits (Representative Lawrence, *supra*). There was no need to rehearse again the many reasons why the state courts could not be entrusted to enforce federal rights, or the many needs for a supervening, imperative federal judicial remedy. Those matters had recently been debated extensively in consideration of the Act of May 11, 1866, *supra*. The condition of affairs in the state courts was well known. "Now, it so happens, as the rebellion is passing away, as the rebel soldiers and officers are returning to their homes, that I may say thousands of suits are springing up all through the land, especially where the rebellion prevailed, against

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[20] To meet Senator Johnson's concern over the absence of territorial limitations on the power of the federal judges to issue habeas corpus, see Cong. Globe, 39th Cong., 2d Sess. 730 (1/25/67), the bill was amended to restrict the habeas grant to the courts and judges "within their respective jurisdictions." *Id.* at 790 (1/28/67). It was so passed by the Senate, *ibid.*, and the House concurred in the amendment without debate, *id.* at 899 (1/31/67).

the loyal men of the country who endeavored to put the rebellion down."[21] "[S]uits are springing up from one end to the other; and these rebel courts are ready to decide against your Union men and acquit the rebel soldier."[22] "A great many vexatious suits have been brought, and they are still pending, and instances have been known—they exist now—where Federal officers have been pushed very hard and put to great hardships and expense, and sometimes convicted of crime, for doing things which were right in the line of duty, and which they were ordered to do and which they could not refuse to do."[23] In Kentucky, "They are

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[21] Cong. Globe, 39th Cong., 1st Sess. 2021 (Clerk in the Senate, 4/18/66). The excerpts of debate cited in this and succeeding notes 22-28 are on consideration of the Act of May 11, 1866, *supra*. Senator Clark reported and managed the bill which became the act. Note 18 *supra*.

The oppressive volume of state litigation against Union men was frequently noted in debate. E.g., Cong. Globe, 39th Cong., 1st Sess. at 1880 (Clark in the Senate, 4/11/66), 1983 (Trumbull, chairman of the Judiciary Committee, in the Senate, 4/17/66). It was that there were over 3000 cases pending in Kentucky alone. *Id.* at 1526, 1529 (McKee, of Kentucky, in the House, 3/20/66), 1983 (Clark in the Senate, 4/17/66), 2021 (Clark in the Senate, 4/18/66), 2054 (Wilson in the Senate, 4/20/66).

[22] *Id.* at 2021 (Clark in the Senate, 4/18/66).

[23] *Id.* at 1880 (Clark in the Senate, 4/11/66). Recognition that the cost of defending suits and prosecutions might itself be ruinous to defendant Union men found strong expression in the comments of Senators Edmunds, *id.* at 2063-2064, and Howe, *id.* at 2064 (4/20/66), in debate of an amendment offered by Edmunds providing that the Secretary of War should defend all actions within the scope of the bill at government expense, and should indemnify the individual defendant for damages, costs, fines and expenses. The amendment, and one proposed by Howe providing for government defense of removed actions, were defeated on the ground that they would overburden the government's financial resources, encourage litigation, encourage collusive actions, result in larger jury verdicts in damage actions, and that defendants could be adequately protected by private indemnifying bills. See *id.* at 2064-2066 (4/20/66). Apart from questions of expense, the injury

harassing, annoying, and even driving out of the State the men who stood true to the flag by suits under the legislation and judiciary rulings of Kentucky. There no protec-

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to state-court defendants of delay in the vindication of their federal rights was pointed up by the debate between Senators Doolittle and Hendricks, who opposed the provision making state judges civilly liable for proceeding after removal of a case to the federal court, and Senators Stewart and Clark, who supported it. Senator Doolittle said that it should not be presumed state judges would flout the federal removal statute. [In fact, state courts had repeatedly obstructed removal by refusing to approve removal bonds, by refusing to transmit the state record to the federal court, and by proceeding against defendants notwithstanding removal, holding the removal statute unconstitutional. See references in note 18, *supra*.] Senator Stewart asked, in effect, what relief there was for an indicted defendant if the state court did flout removal, pointing out that a state judge could force an indictment to trial even without the cooperation of the state prosecutor. Senator Hendricks replied that the defendant's remedy was by appeal through the higher state courts to the Supreme Court of the United States. Senator Stewart rejoined: "But suppose the judge goes on and convicts the man and sends him to the penitentiary, he must lie there until the case can be heard in the Supreme Court, three or four years hence." Senator Doolittle thought it sufficient protection to the defendant that federal law forbid the state jail authorities to detain the defendant in such a case, and make them civilly liable if they do. Senator Stewart pointed out that the state judge had strong coercive powers over state officers, and Senator Clark closed the debate:

> "Mr. CLARK. I desire to make but one suggestion in answer to the Senator from Wisconsin, and that is one of fact. He says if it were necessary that these judges should be proceeded against he would not object. I hold in my hand a communication from a member of the other House from Kentucky, in which he says that all the judicial districts of Kentucky, with the exception of one, are in the hands of sympathizing judges. They entirely disregard the [removal] act to which this is an amendment. They refuse to allow the transfer, and proceed against these men as if nothing had taken place. Here is not the assumption that these judges will not do this; here is the fact that they do not do it, and it is necessary that these men should be protected." *Id.* at 2063 (4/20/66).

Senators Stewart and Clark prevailed in the vote on an amendment seeking to strike the provision making the state judges liable. *Ibid.*

tion is guaranteed to a Federal soldier." [34] "[I]n another county of that State the grand jury indicted every Union judge, sheriff, and clerk of the election of August, 1865. In addition to that every loyal man who had been in the Army and had, under the order of his superior officer, taken a horse, was indicted." [35] Discrimination against the Union men "is the rule in Kentucky, except in one solitary district, and the Legislature at its last session inauguarated means of removing that judge, simply because he dared to carry out this act of the Federal Congress [the 1863 removal statute]." [36] "There must be some way of remedying this crying evil, and these men who have been engaged in the defense of the country cannot be permitted to be persecuted in this sort of way. Then life becomes hardly worth having, if, after having driven the rebels out of their country and subdued them, those rebels are to be permitted to return and harass them from morning until night and from night till morning, and make their life a curse for that very defense which they have given your country." [37]

It is impossible to read these debates of the thirty-ninth Congress without concluding that the federal legislators were intensely aware of the hostility and anti-Union prejudice of the southern state courts[38] and of the use of state court proceedings to harass the Union men. Nor, under

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[34] *Id.* at 1526 (McKee, of Kentucky, in the House, 3/20/66).

[35] *Id.* at 1527 (Smith, of Kentucky, in the House, 3/20/66). See also *id.* at 1526 (McKee, of Kentucky, in the House, 3/20/66).

[36] *Ibid.* (McKee, of Kentucky, in the House, 3/20/66). See also *id.* at 2063 (Clark in the Senate, 4/20/66).

[37] *Id.* at 2054 (Clark in the Senate, 4/20/66).

[38] E.g., *id.* at 1526 (McKee, of Kentucky, in the House, 3/20/66), 1527 (Garfield and Smith, of Kentucky, in the House, 3/20/66), 1529 (Cook, who reported the bill and was its floor manager, see note 18 *supra*, in the House, 3/20/66), 2054, 2063 (Clark in the

these circumstances, was this Congress willing to adopt a hands-off attitude toward state criminal administration. During nearly three-quarters of a century following the First Judiciary Act of September 24, 1789, ch. 20, 1 Stat. 73, Congress had relegated the enforcement of federal rights generally to the state trial courts,[29] subject to limited review by the Supreme Court of the United States, and had shown itself particularly reluctant to interject the federal courts into the course of state criminal proceedings.[30] It had authorized only limited federal judicial incursions—by removal provisions in 1815 and 1833[31] and anticipatory,

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Senate 4/20/66). Clark pointed out that hostile state legislatures could not be looked to for redress of the discriminations practiced by hostile state judges. *Id.* at 2054 (4/20/66). The only relief for the Union men was access to the federal courts: "There is where they are most likely to have their rights protected. There is where local prejudices are frowned down." *Id.* at 1526 (McKee, of Kentucky, in the House, 3/20/66); see also *id.* at 1528 (Smith, of Kentucky, in the House, 3/20/66), 1529-1530 (Cook in the House, 3/20/66); cf. *id.* at 1387 (Cook in the House, 3/14/66).

[29] HART & WECHSLER, THE FEDERAL COURTS AND THE FEDERAL SYSTEM 727 (1954). Except for the brief interlude following the Act of February 13, 1801, ch. 4, § 11, 2 Stat. 89, 92, repealed by the Act of March 8, 1802, ch. 8, 2 Stat. 132, the lower federal courts had no general federal question jurisdiction until 1875. Judiciary Act of March 3, 1875, ch. 137, 18 Stat. 470.

[30] The First Judiciary Act, for example, was explicit in excepting state prisoners from the federal habeas corpus jurisdiction. See note 13 *supra*. Congressional reluctance to involve the lower federal courts in state criminal proceedings is understandable enough when one considers the furor raised as late as 1821 by *Supreme Court* assumption of jurisdiction to review federal questions in state criminal cases. Cohens v. Virginia, 6 Wheat. 264 (1821); 1 WARREN, THE SUPREME COURT IN UNITED STATES HISTORY 547-559 (Rev. ed. 1932).

[31] Act of February 4, 1815, ch. 31, § 8, 3 Stat. 195, 198; Act of March 3, 1815, ch. 43, § 6, 3 Stat. 231, 233. These statutes responded to New England resistance to the War of 1812. See 1 MORISON & COMMAGER, GROWTH OF THE AMERICAN REPUBLIC 428, 429 (4th ed. 1950). The Force Act of March 2, 1833 has been discussed at p. 23 *supra*.

habeas corpus grants in 1833 and 1842[32]—in cases where there were extraordinary reasons to distrust the state judicial institutions. But the experience of the Civil War and the beginnings or Reconstruction brought new attitudes. Extensive civil and criminal removal statutes were enacted, covering in 1863 persons acting under Presidential order or act of Congress during the rebellion, in 1864 federal internal revenue officers and persons acting under them, in 1866 civil rights cases, again in 1866 all persons acting during the rebellion under military orders, and in 1871 voting enforcement cases.[33] Union military commanders under the Congressional Reconstruction program withdrew from the state courts in the South civil and criminal jurisdiction over all cases involving union soldiers and freedmen, and gave the jurisdiction to national military tribunals.[34] Subsequently, implementing the new guarantees in which the Thirteenth, Fourteenth and Fifteenth Amendments committed the federal government to protect its citizens against the States, Congress was to create in 1871 a broad civil rights jurisdiction[35] whose purpose was to supersede state judicial processes without respect to exhaustion of state remedies,

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[32] See pp. 25-27 *supra.*

[33] Act of March 3, 1863, ch. 81, § 5, 12 Stat. 755, 756, p. 26 *supra;* Act of March 7, 1864, ch. 20, § 9, 13 Stat. 14, 17 and Act of June 30, 1864, ch. 173, § 50, 13 Stat. 223, 241, amended by the Act of July 13, 1866, ch. 184, 14 Stat. 98 (these last three statutes covering revenue officers); Act of April 9, 1866, ch. 31, § 3, 14 Stat. 27, note 19 *supra;* Act of May 11, 1866, ch. 80, 14 Stat. 46, pp. 26-27 *supra;* Act of February 28, 1871, ch. 99, § 16, 16 Stat. 438.

[34] See Cong. Globe, 39th Cong., 1st Sess. 1834 (4/7/66); DUNNING, ESSAYS ON THE CIVIL WAR AND RECONSTRUCTION 147, 156-163 (1898).

[35] Act of April 20, 1871, ch. 22, § 1, 17 Stat. 13, the third Civil Rights Act, called the Ku Klux Act. The jurisdiction survives in present 28 U. S. C. § 1343 (1958) and Rev. Stat. § 1979, 42 U. S. C. § 1983 (1958).

"because, by reason of prejudice, passion, neglect, intolerance or otherwise, state laws might not be enforced and the claims of citizens to the enjoyment of rights, privileges, and immunities guaranteed by the Fourteenth Amendment might be denied by the state agencies." [36] No longer was it assumed that the state courts were the fit tribunals for the protection of federal interests except in the relatively rare cases where they showed themselves unfit. Now those courts were seen as instruments for the deprivation of federally guaranteed liberties, and Congress acted to supplant them with a pervasive federal trial jurisdiction.[37]

In similar, though more limited, circumstances in 1833—South Carolina's resistance to the Tariff of Abominations—Congress had responded by the creation both of removal and of anticipatory habeas corpus jurisdiction to enable federal courts to protect the tariff officials. The removal legislation of 1863 and 1866 was patterned on that of 1833.[38]

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[36] Monroe v. Pape, 365 U. S. 167, 180 (1961). The purpose of the 1871 statute to provide a federal forum for the vindication of federal civil rights notwithstanding failure to exhaust state remedies was reaffirmed in McNeese v. Board of Education, 373 U. S. 668 (1963).

[37] Each of the four major civil rights acts contained jurisdictional provisions giving enforcement power to the federal trial courts. Act of April 9, 1866, ch. 31, § 3, 14 Stat. 27; Act of May 31, 1870, ch. 114, §§ 8, 18, 16 Stat. 140, 142, 144; Act of April 20, 1871, ch. 22, § 1, 17 Stat. 13; Act of March 1, 1875, ch. 114, § 3, 18 Stat. 335, 336. Significantly, by the Judiciary Act of March 3, 1875, ch. 137, 18 Stat. 470, Congress gave general federal question jurisdiction to the lower federal courts, thus establishing that henceforth those courts, not the state courts, were to be the ordinary and natural agencies for the administration of federal law. See FRANKFURTER & LANDIS, THE BUSINESS OF THE SUPREME COURT 64-65 (1928).

[38] See Cong. Globe, 39th Cong., 1st Sess. 1387 (Cook in the House, 3/14/66).

But removal proved in practice an insufficient protection against hostile state courts;[39] subjection of defendants to the initial stages of state process offered large opportunities for harassment and obstruction in the vindication of federal rights. With this knowledge, Congress enacted the habeas corpus statute of 1867, and the temper of the times clearly supports the conclusion that "the proponents of the remedy certainly contemplated the by-passing of the state judicial processes." *Brennan, Federal Habeas Corpus for State Prisoners: An Exercise in Federalism,* 7 UTAH L. REV. 423, 426 (1961).[40] It is fair to say that the purpose of the Congress which created the federal habeas jurisdiction now codified in 28 U. S. C. § 2241(c)(3) (1958) flatly repels the conception that persons seeking to enforce the civil rights which the nation won for them in the Civil War and preserved by the post-War amendments should be remitted for exhaustion of remedies to the state courts which were the very agencies of harassing them in the exercise of those rights.

(3) *Judicial development of the exhaustion doctrine.*

The broad scope of the habeas corpus jurisdiction conferred by the 1867 act was immediately recognized by the Supreme Court. "This legislation is of the most comprehensive character. It brings within the *habeas corpus* jurisdiction of every court and of every judge every possible case of privation of liberty contrary to the National

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[39] By a variety of devices, the state courts had managed to defeat removal under the 1863 act. See notes 18, 23 *supra;* also Cong. Globe, 39th Cong., 1st Sess. 1526 (McKee, of Kentucky, in the House, 3/20/66), 1527 (Smith, of Kentucky, in the House, 3/20/66), 2054 (Wilson in the Senate, 4/20/66).

[40] See Justice Brennan's statement for the Court in *Fay* v. *Noia,* p. 28 *supra.*

Constitution, treaties, or laws. It is impossible to widen this jurisdiction." *Ex parte McCardle,* 6 Wall. 318, 325-326 (1867). Ironically the act was invoked in McCardle's case not by a state prisoner complaining of state restraint in violation of federally guaranteed freedoms or federally protected interests, but by a Union army prisoner held for trial before a military commission on charges of publishing anti-Union propaganda in the newspaper of which he was an editor; his habeas corpus petition challenged the validity of the federal Reconstruction Acts, and Congress, fearful that the Supreme Court would void the legislation, immediately withdrew its appellate jurisdiction in cases (including McCardle's) arising under the 1867 habeas statute. Act of March 27, 1868, ch. 34, § 2, 15 Stat. 44; see *Ex parte McCardle,* 7 Wall. 506 (1869). This left it to the lower federal courts, during the years until the Supreme Court's appellate jurisdiction was restored by the Act of March 3, 1885, ch. 353, 23 Stat. 437, to construe the new habeas corpus grant without Supreme Court guidance. Significantly, these contemporary lower court decisions viewed the 1867 statute as imperatively demanding federal discharge of state prisoners held for trial or after state trial-court conviction, notwithstanding the existence of still unexhausted state remedies. *Ex parte McCready,* 15 Fed. Cas. 1345, No. 8,732 (C. C. E. D. Va. 1874); *Ex parte Bridges,* 4 Fed. Cas. 98, No. 1,862 (C. C. N. D. Ga. 1875); *Ex parte Tatem,* 23 Fed. Cas. 708, No. 13,759 (E. D. Va. 1877). Particularly, in a series of cases arising out of prosecutions under legislation by which the Pacific Coast States and municipalities sought to discriminate against the immigrant Chinese, federal district and circuit courts, striking down the legislation under the Fourteenth Amendment, released their habeas corpus petitioners in advance of state trial or im-

mediately following summary state conviction. *In re Parrott,* 1 Fed. 481 (C. C. D. Cal. 1880); *In re Quong Woo,* 13 Fed. 229 (C. C. D. Cal. 1882); *In re Lee Tong,* 18 Fed. 253 (D. Ore. 1883); *In re Wan Yin,* 22 Fed. 701 (D. Ore. 1885); *Ex parte Ah Lit,* 26 Fed. 512 (D. Ore. 1886); *In re Tie Loy,* 26 Fed. 611 (C. C. D. Cal. 1886). In some of these cases, particularly those from the Oregon District Court, the *substantive* holdings of unconstitutionality were more or less extravagant (the Oregon District Judge voided several municipal ordinances on the theory that, being *ultra vires* state enabling legislation, they violated due process of law); these decisions were received with consternation by the legal profession, see REPORT OF THE SEVENTH ANNUAL MEETING OF THE AMERICAN BAR ASSOCIATION 12-44 (1884), which in turn led Congress to reestablish the Supreme Court's appellate jurisdiction in habeas cases in 1885. Doubtless the same consternation respecting the scope given the Due Process Clause by some lower courts accounts in part for the birth of the exhaustion doctrine in *Ex parte Royall,* 117 U. S. 241 (1886), the following year.

Royall was not a case in which a habeas petitioner invoked federal constitutional protection in the service of the federal interests or the federal freedoms with which the Reconstruction Congress had been principally concerned. It presented a Contracts Clause question, and had every appearance of a carefully made test case by which Royall, being in no particular circumstance of urgency, was employing the habeas corpus route as the most convenient device to obtain a Supreme Court ruling on the validity of Virginia's state bond coupon legislation.[41] The

[41] Royall, an attorney, had been at large on bond for almost a year after his arrest in 1884; shortly after passage of the statute restoring the Supreme Court's appellate habeas jurisdiction, he surrendered into custody and filed his petition.

case was unarguably within the broad jurisdictional language of the 1867 habeas corpus grant, but as obviously without its purposes. In this context—and in the calmer post-Reconstruction era which resembled neither 1867 nor 1965 in the South—the Supreme Court understandably concluded that the federal habeas courts (although empowered to discharge state criminal defendants before state trial, 117 U. S. at 245-250) had and should exercise a "discretion," 117 U. S. at 251, to abstain in favor of the orderly process of state court trial and appeal, "that discretion, however, to be subordinated to any special circumstances requiring immediate action," 117 U. S. at 253. Like *Royall*, the cases which soon followed it in refusing federal habeas corpus to a prisoner in advance of his state trial involved issues which (where not altogether frivolous), either did not implicate the post-War Amendments[42] or saw the Fourteenth Amendment invoked against state regulatory legislation by economic interests apparently able to bear without harm the burdens of protracted state-court litigation.[43] With the expansion of conceptions of due process as a limitation upon state criminal procedure and the consequent expansion of federal habeas corpus as a post-conviction remedy,[44] the focus of litigation under the *Royall* doctrine became the question of exhaustion of state collateral remedies for federal constitutional violations in the trial process; in these cases exhaustion was rigorously de-

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[42] See the cases cited at p. 19 *supra;* also, Cunningham v. Skiriotes, 101 F. 2d 635 (5th Cir. 1939); United States ex rel. Silverman v. Fiscus, 42 Fed. 395 (W. D. Pa. 1890); In re Alexander, 84 Fed. 633 (W. D. N. C. 1898); cf. Minnesota v. Brundage, 180 U. S. 499 (1901).

[43] See Baker v. Grice, 169 U. S. 284 (1898); Ex parte Bartlett, 197 Fed. 98 (E. D. Wisc. 1912).

[44] See discussion in sources collected in note 14 *supra.*

manded of Fourteenth Amendment claimants,[45] perhaps because the need for immediate federal intervention seemed less compelling where the nature of the state judicial proceedings (rather than the power of the State to proceed at all in the premises) was challenged, perhaps because the outstanding early post-conviction cases were death cases where the habeas petitioner had no particular objection to delay so long as he remained unexecuted in the interim, more probably because the *Royall* principle was simply carried over unthinkingly from Contract Clause and Commerce Clause cases to Fourteenth Amendment cases having no smack of urgency about them, and thence to all Fourteenth Amendment cases, subject to the "exceptional circumstances" qualification. It is enlightening that this was not the contemporary view of *Royall.* For in the West Coast Chinese cases raising significant Due Process and Equal Protection challenges to state legislation on its face or as applied, see p. 42 *supra,* the lower federal courts continued to protect the Chinese by anticipatory habeas corpus even after *Royall,* see *In re Sam Kee,* 31 Fed. 680 (C. C. N. D. Cal. 1887); *In re Lee Sing,* 43 Fed. 359 (C. C. N. D. Cal. 1890). And this Court itself approved such an employment of habeas corpus, without consideration of exhaustion of state remedies, in *Wo Lee* v. *Hopkins,* reported with *Yick Wo* v. *Hopkins,* 118 U. S. 356 (1886). The Fifth Circuit's decisions in *Application of Wyckoff, Brown* v. *Rayfield,* and the present case, requiring exhaustion in similar situations, are inconsistent with these cases.

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[45] E.g., Mooney v. Holohan, 294 U. S. 103 (1935); Ex parte Hawk, 321 U. S. 114 (1944).

(4) *Application of the exhaustion doctrine to civil rights cases.*

Petitioner asks this Court to repudiate these latter-day extensions of the exhaustion requirement. Her position, simply, is that a habeas petition states a case for anticipatory federal habeas corpus relief if it shows that the petitioner is held for state prosecution on account of an act which was in the exercise of civil rights[46] protected by the Fourteenth Amendment or Fifteenth Amendment. The protection of civil rights, the protection of the liberty of the freedman and the loyal Union man in the South against persecution and oppression, were paramount objects of the Congress which enacted the 1867 habeas corpus statute. Aware that state courts were being used as agencies of harassment, Congress enlarged the federal habeas corpus jurisdiction—theretofore always employed by it as a pretrial remedy to abort state proceedings which infringed particular federal concerns—to reach all cases of restraint of liberty in violation of federal law; it enacted that, after proceeding "in a summary way to determine the facts of the case, . . . if it shall appear that the petitioner is deprived of his or her liberty in contravention of the constitution or laws of the United States, he or she shall forthwith be discharged and set at liberty," and all subsequent state court proceedings shall be void. 14 Stat. 386. Doubtless *Royall* exercised a permissible judicial license in holding that a

[46] The phrase "civil rights" is used advisedly, despite the possibility of unclarity at its fringes, to designate what Mr. Justice Stone in dealing with a cognate statute described as a "right or immunity . . . of personal liberty, not dependent for its existence upon the infringement of property rights." Hague v. C. I. O., 307 U. S. 496, 518, 531 (1939) (plurality opinion). Congress has used the words "civil rights" with, apparently, the same meaning, 28 U. S. C. § 1343(4) (1958).

federal habeas court need not always "forthwith" award the writ in advance of a state trial despite the peremptory tone of the statute. But "the court could not, against the positive language of Congress, declare any such exception," *Ex parte Royall,* 117 U. S. at 249, and the exception which *Royall* allowed to the exercise of a congressionally-given jurisdiction[47] was allowed only because it was supposed to be not inconsistent with congressional purpose, 117 U. S. at 251, 252. In situations which, like *Royall,* fall within the 1867 statute's terms but not within the immediate range of congressional concern or foresight, implication of judicial "discretion" to delay relief may properly be thought not inconsistent with the statute. However, reading the statute fairly against its background, it is obvious that Congress intended principally the creation of a summary, supervening federal trial jurisdiction brooking no accommodation of state court processes; and, at least in that class of cases where the operation of such a jurisdiction was clearly foreseeable in light of the circumstances which give rise to the enactment, that sort of jurisdiction should be exercised as given. This is the case where a habeas petitioner seeks relief from state restraint imposed on him on account of his exercise of the civil rights guaranteed by the post-War Amendments and their enforcing legislation.

The mainspring of *Royall* is the principle that the "discretion [of a federal habeas court to abstain until state remedies are exhausted] should be exercised in the light of the relations existing, under our system of government, between the judicial tribunals of the Union and of the States, and in recognition of the fact that the public good

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[47] Cf. Chief Justice Marshall, in Cohens v. Virginia, 6 Wheat. 264, 404 (1821): "We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given. The one or the other would be treason to the constitution."

requires that those relations be not disturbed by unnecessary conflict between courts equally bound to guard and protect rights secured by the Constitution." 117 U. S. at 251. In appraising the appropriate "relations existing . . . between the judicial tribunals of the Union and of the States," it is pertinent to inquire what specific "rights" are in issue, what the Constitution and the Congress (by other legislation than the habeas corpus statute itself) have said about their importance and the usual forum for their enforcement, and, finally, what the federal and state courts respectively can do and are in fact doing under their obligation "to guard and protect" those rights. Federal abstention in favor of state court processes under this principle presupposes that, in respect of the subject matter of the litigation, the state courts have a generally primary competence or responsibility—that they are the ordinary and normal place for such litigation. However valid this may be regarding other federal questions (and particularly those of procedural due process, where the federal claim arises out of the state court proceedings themselves), it is clearly not so in matters of civil rights. For not only did the Reconstruction Congress create an extensive original federal jurisdiction in civil rights cases, see note 35 *supra*, it created in § 3 of the first Civil Rights Act, in 1866, federal removal jurisdiction over state criminal cases implicating civil rights, and even original criminal jurisdiction over state-law offenses affecting persons denied their federal civil rights.[48] An impressive array of recent decisions—

[48] Act of April 9, 1866, ch. 31, § 3, 14 Stat. 27, predecessor of present 28 U. S. C. § 1443 (1958). Only in the cases of original federal criminal jurisdiction over state-law crimes and in removal cases not arising from the exercise of federal civil rights, did the 1866 act admit a place for state court responsibility in the first instance.

Fay v. *Noia*, 372 U. S. 391 (1963); *Townsend* v. *Sain*, 372 U. S. 293 (1963); *Monroe* v. *Pape*, 365 U. S. 167 (1961); *McNeese* v. *Board of Education*, 373 U. S. 668 (1963); *Baggett* v. *Bullitt*, 377 U. S. 360 (1964); *Dombrowski* v. *Pfister*, 380 U. S. 479 (1965); *Rachel* v. *Georgia*, 342 F. 2d 336 (5th Cir. 1965); *Peacock* v. *City of Greenwood*, 347 F. 2d 679 (5th Cir. 1965); *Cox* v. *Louisiana*, 348 F. 2d 750 (5th Cir. 1965), all decided under the Reconstruction legislation—recognize the primary responsibility of the federal courts "within this precious area" where "Congress has declared the historic judgment that . . . there is to be no slightest risk of nullification by state process . . . not because the interest of the state is smaller in such cases, but because its interest is outweighed by other factors of the highest national concern." *Wechsler, Federal Jurisdiction and the Revision of the Judicial Code*, 13 LAW & CONTEMP. PROB. 216, 230 (1948). In this area, consistently with *Royall*, deference to state process is unwarranted.

To assume jurisdiction in the present case, however, the Court need not reach the question of the application of the exhaustion doctrine to all civil rights cases. This case is a particularly strong one for anticipatory federal relief.

Under the allegations of paragraphs VI and VIII of the petition, and on the basis of Mississippi legislation which the court may judicially notice, see p. 16 *supra*, it is apparent that the State of Mississippi has mounted and is maintaining a comprehensive practice of resistance to federal civil rights. Mississippi's massive resistance is pertinent here for several reasons. First, the decision in *Royall's* case to delay the summary exercise of a jurisdiction given the federal courts by Congress in order effectively to protect federal rights was premised on the assumption

that state and federal courts were "equally bound to guard and protect rights secured by the Constitution," 117 U. S. at 251, and that the state courts in general would probably do their job. Where the hostility of all state authorities to a particular class of federal rights is intense, the probability that the state courts will defend those rights diminishes so substantially as no longer to justify the assumption made in *Royall* or the judgment of accommodation based upon it. Second, the fact of massive state resistance to federal constitutional guarantees is itself a substantial threat to the principle of national supremacy in matters of national concern upon which American federalism is based, and thus *per se* implicates "the authority and operations of the General Government" within a recognized exception to the exhaustion doctrine described at pp. 53-57. Cf. *Cooper* v. *Aaron*, 358 U. S. 1 (1958); *Griffin* v. *County School Board of Prince Edward County*, 377 U. S. 218 (1964). Third, the situation of massive resistance to federally protected interests was exactly that which faced the Congress in 1867 and to which it responded with the grant of habeas corpus jurisdiction which petitioner invokes. The statutory history of this grant compels the conclusion that, at least in this situation, Congress intended the federal habeas corpus courts to supersede, not defer to, state courts which were then, as now, used as the instruments for the harassment of individuals asserting federal rights. The *Royall* doctrine, emerging after Reconstruction as a principle for the operation of the federal courts in calmer days, found that abnegation of the summary jurisdiction given by the habeas corpus legislation was not inconsistent with the legislation's purposes. Application of the doctrine in modern instances of massive resistance would be flatly inconsistent with those purposes.

Moreover, petitioner here invokes the habeas corpus jurisdiction in vindication of rights secured by the First and Fourteenth Amendments: freedom of speech, association and assembly in the service of political expression. This Court has time and again said that these rights occupy a constitutionally preferred position,[49] and it has recognized that "The threat of sanctions may deter their exercise almost as potently as the actual application of sanctions." *N.A.A.C.P.* v. *Button,* 371 U. S. 415, 433 (1963). See also *Smith* v. *California,* 361 U. S. 147, 151 (1959); *Bantam Books, Inc.* v. *Sullivan,* 372 U. S. 58, 66-70 (1963); *Cramp* v. *Board of Public Instruction,* 368 U. S. 278, 286-288 (1961); *Garrison* v. *Louisiana,* 379 U. S. 64, 70 (1964). "[P]rosecution is punishment," *Dilworth* v. *Riner,* 343 F. 2d 226, 231 (5th Cir. 1965), no less in First Amendment than in other civil rights cases; and where the First Amendment is involved, the need for immediate federal judicial process to resist even slight state repression is the more imperious. *Dombrowski* v. *Pfister,* 380 U. S. 479 (1965); *Cox* v. *Louisiana,* 348 F. 2d 750 (5th Cir. 1965). By means of the present prosecution, the State of Mississippi is harassing petitioner, punishing her for the past exercise of First-Fourteenth Amendment freedoms, deterring her future exercise of these freedoms, and, through petitioner, stifling and repressing COFO and Negro voter registration. So long as this prosecution is pending, state power to forbid petitioner's activities is confidently asserted; until the prosecution is disposed of and that power denied, few will be hardy enough to exercise their rights

[49] Marsh v. Alabama, 326 U. S. 501, 509 (1946), and opinions cited; Prince v. Massachusetts, 321 U. S. 158, 164 (1944); Saia v. New York, 334 U. S. 558, 562 (1948); cf. New York Times v. Sullivan, 376 U. S. 254, 269-270 (1964).

and follow petitioner into the toils of Mississippi justice. Years of delay in the vindication of freedoms essential to the daily functioning of democracy are the price of federal abstention under the exhaustion doctrine.[50] "Meanwhile, where the vagueness of the statute"—and its consequent susceptibility to use as an instrument of racial harassment—"deters constitutionally protected conduct, 'the free dissemination of ideas may be the loser,'" *Baggett* v. *Bullitt*, 377 U. S. 360, 379 (1964), and the long, bitterly resisted struggle of the Mississippi Negroes against unconstitutional disfranchisement will be further prolonged in frustration.

Petitioner claims that the statute under which she is prosecuted is void and unconstitutional on its face. If this is so, the policy against disturbance of state criminal proceedings is not strong, for Mississippi's interest in the unimpeded administration of a statute which it cannot constitutionally apply in any case is surely minimal. On the other hand, the high priority which the Court has assigned to First Amendment liberties and its traditional concern lest the threat of punishment suppress unpopular speech give impressive cause for recognition that the very pen-

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[50] In February and March, 1964, the Supreme Court of Mississippi reached, and affirmed, convictions in harassment prosecutions arising out of the May, 1961 Freedom Rides. See Thomas v. State, 160 So. 2d 657 (Miss. 1964); Farmer v. State, 161 So. 2d 159 (Miss. 1964), and companion cases; Knight v. State, 161 So. 2d 521 (Miss. 1964). And more than another year was to pass before the Supreme Court of the United States reached, and reversed, these convictions. *Thomas* v. *Mississippi*, 380 U. S. 524 (1965). Compare Edwards v. South Carolina, 372 U. S. 229 (1963) (two years from arrest to Supreme Court reversal of conviction); Fields v. South Carolina, 375 U. S. 44 (1963) (three and a half years from arrest to Supreme Court reversal of conviction); Henry v. Rock Hill, 376 U. S. 776 (1964) (more than four years from arrest to Supreme Court reversal of conviction).

dency of state prosecutions aimed at First Amendment conduct and calculated to harass those whose speech and association are unpopular and to deter others from speech and work in the service of unpopular causes, is itself an intolerable clog on First Amendment freedom. Summary federal disposition of such prosecutions is the more imperatively demanded because the power to suppress speech even briefly by harassment is the power to render it ineffective as an instrument of democratic political action.

Petitioner also claims that the statute is unconstitutional as applied to her situation. Such a claim depends on facts, and the power of the trier of the facts to find the facts adversely to petitioner is the power to destroy her constitutional freedoms. See, e.g., *Feiner* v. *New York,* 340 U. S. 315, 319, 321 (1951). The whole purpose of the creation of a federal trial jurisdiction in habeas corpus in 1867 was to relieve persons claiming federal constitutional or statutory protection from resort to unsympathetic state courts, to give them a federal forum "where local prejudices are frowned down," see note 28 *supra,* where their federal rights were not crushed by the risk of biased fact-finding. For that risk not only works to impede the ultimate vindication of the federal rights of a state criminal defendant who goes to trial in the state courts; the knowledge that effective enforcement of these rights is committed to the largely unreviewable power of state magistrates and judges tends broadly to deter their exercise in the service of unpopular causes. For these reasons, "[t]he possibility of appellate review by [the Supreme Court of the United States] . . . of a state court determination may not be substituted, against a party's wishes, for his right to litigate his federal claims fully in the federal courts." *Eng-*

land v. *Louisiana State Board of Medical Examiners*, 375 U. S. 411, 417 (1964). *After* her conviction in the state courts, it is clear petitioner will be entitled to trial de novo of the facts on federal habeas corpus. See *Townsend* v. *Sain*, 372 U. S. 293 (1963). Pretrial federal habeas corpus relief is no greater disruption of "the relations existing, under our system of government, between the judicial tribunals of the Union and of the States," *Ex parte Royall*, 117 U. S. at 251, than post-conviction federal habeas corpus relief. The only difference is that the first remedy is timely and effective, while the second is not.

(5) *Application of the exhaustion doctrine to cases involving federal voting rights.*

But there is still a narrower ground on which the decision below is wrong and—in this aspect—inconsistent with decisions of this Court. One long recognized exception to the ordinary doctrine requiring exhaustion of state judicial remedies before resort to a federal court on habeas corpus is the principle, recognized in the *Royall* opinion itself, that special circumstances justifying anticipatory federal habeas corpus relief are presented in "cases of urgency, involving the authority and operations of the General Government." 117 U. S. at 251. The classic case is *In re Neagle*, 135 U. S. 1 (1890), where the Court affirmed the discharge of a federal deputy marshal committed for examination on a California murder charge which, the Court found, arose out of a killing committed in the scope of his authority as a bodyguard to Mr. Justice Field, who was then traveling as a Circuit Justice.

"... But all these questions [of Neagle's authority to kill in protection of Justice Field] being conceded,

it is urged against the relief sought by this writ of *habeas corpus,* that the question of the guilt of the prisoner of the crime of murder is a question to be determined by the laws of California, and to be decided by its courts, and that there exists no power in the government of the United States to take away the prisoner from the custody of the proper authorities of the State of California and carry him before a judge of the court of the United States, and release him without a trial by jury according to the laws of the State of California. That the statute of the United States [present 28 U. S. C. § 2241 (1958)] authorizes and directs such a proceeding and such a judgment in a case where the offence charged against the prisoner consists in an act done in pursuance of a law of the United States and by virtue of its authority [present § 2241 (c)(2)], and where the imprisonment of the party is in violation of the Constitution and laws of the United States [present § 2241(c)(3)], is clear by its express language" 135 U. S. at 69-70.

The exercise of the power approved in *Neagle's* case was approved again in *Ohio* v. *Thomas,* 173 U. S. 276 (1899), affirming the release on habeas corpus, prior to trial de novo on summary appeal from a justice of the peace conviction, of the governor of a federal disabled veteran's home prosecuted for serving oleomargarine in the mess room in violation of a state statute regulating oleo. Following these decisions, the lower federal courts have ordinarily entertained petitions for the writ in advance of state trial in cases where federal officers are prosecuted, e.g., *Reed* v. *Madden,* 87 F. 2d 846 (8th Cir. 1937); *In re Fair,* 100 Fed. 149 (C. C. D. Neb. 1900); *United States ex rel.*

Flynn v. *Fuellhart*, 106 Fed. 911 (C. C. W. D. Pa. 1901); *United States* v. *Lipsett*, 156 Fed. 65 (W. D. Mich. 1907); *Ex parte Warner*, 21 F. 2d 542 (N. D. Okla. 1927); *Brown* v. *Cain*, 56 F. Supp. 56 (E. D. Pa. 1944); *Lima* v. *Lawler*, 63 F. Supp. 446 (E. D. Va. 1945), or where private citizens acting under federal officers are prosecuted, *Anderson* v. *Elliott*, 101 Fed. 609 (4th Cir. 1900), dism'd 22 S. Ct. 930 (1902); *West Virginia* v. *Laing*, 133 Fed. 887 (4th Cir. 1904).[51]

The principle of *Neagle*, however, carries beyond such cases. In *Wildenhus's Case*, 120 U. S. 1 (1887), the Court held that federal habeas corpus was appropriately used to inquire into the claim that three alien seamen, one bound over to a state grand jury on a murder charge and two committed as material witnesses to the offense, were exempt from state criminal jurisdiction by virtue of a treaty.[52] In *In re Loney*, 134 U. S. 372 (1890), it affirmed the federal circuit court's discharge of a habeas petitioner held by the

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[51] Discharge of federal officers has sometimes been denied after evidentiary hearing where the evidence did not preponderately show that the officer was acting within the scope of his federal authority. United States ex rel. Drury v. Lewis, 200 U. S. 1 (1906); Birsch v. Tumbleson, 31 F. 2d 811 (4th Cir. 1929); Castle v. Lewis, 254 Fed. 917 (8th Cir. 1918); Ex parte Tilden, 218 Fed. 920 (D. Ida. 1914). The evidentiary standard is discussed in Brown v. Cain and Lima v. Lawler, cited in text *supra*. These cases do not reflect hesitation to use the federal writ in any case in which the interests of the federal government are affected; they indicate only that, in each case, the federal interest was not sufficiently shown on the facts. See In re Matthews, 122 Fed. 248 (E. D. Ky. 1902), and particularly In re Miller, 42 Fed. 307 (E. D. S. C. 1890); cf. Ex parte United States ex rel. Anderson, 67 F. Supp. 374 (S. D. Fla. 1946), decided on same grounds without a hearing.

[52] United States ex rel. Kennedy v. Tyler, 269 U. S. 13, 19 (1925), puts *Wildenhus* on the ground that it "concerned the delicate relations of [the] . . . government with a foreign nation." It should be noted that the petition was filed by the foreign consul. Relief was denied on the merits.

police sergeant of Richmond, Virginia on a warrant charging him with perjury in giving his deposition before a notary public in the case of a contested election of a member of the federal House of Representatives. And in *Ex parte Wood*, 155 Fed. 190 (C. C. W. D. N. C. 1907), the circuit court entertained a habeas corpus petition, following conviction in a police justice's court but before appeal for trial de novo in the superior court, of a railroad ticket agent charged with selling tickets at rates in excess of those fixed by a state statute whose enforcement the circuit court had previously enjoined. The court held the statute unconstitutional, found that open and avowed resistance by state officials to its injunction presented a situation involving "[n]ot only . . . the rights of litigants . . . , but the dignity and authority of the Circuit Court of the United States as well," 155 Fed. at 191, and discharged the petitioner. The Supreme Court cited *Neagle* and affirmed. *Hunter* v. *Wood*, 209 U. S. 205 (1908).[23]

The present case falls well within the scope of these decisions. As *Loney* suggests, nothing more substantially affects "the authority and operations of the General Government" than matters touching the very voting process by which officers of the national government are elected. Upon the fair and effective operation of the voting process, including voter registration, depends the democratic character of the government established by the Constitution. That this is not a matter of mere private rights has been legislatively determined: Congress has authorized suit by the Attorney General in the public interest to protect the franchise. 42 U. S. C. A. § 1971(c)-(f) (1963 Supp.), amended by Title I of the Civil Rights Act of 1964, 78 Stat.

[23] And see Ex parte Conway, 48 Fed. 77 (C. C. D. S. C. 1891).

241-242, adding two new subsections. And Congress has recognized in 42 U. S. C. A. § 1971(d) (1963 Supp.) that the federal district courts are the appropriate forum for the litigation of matters affecting the right to vote "without regard to whether the party aggrieved shall have exhausted any . . . other remedies. . . . " Against this background of federal governmental involvement and express congressional concern, the Court of Appeals for the Fifth Circuit has authorized the United States to sue to restrain Mississippi prosecution of a voter registration worker in circumstances strikingly similar to those of the present case. *United States* v. *Wood*, 295 F. 2d 772 (5th Cir. 1961), *cert. denied*, 369 U. S. 850 (1962). The same considerations which were dispositive in *Wood* bring the present harassment prosecution of a registration worker within the *Neagle-Loney* principle:

> "The foundation of our form of government is the consent of the governed. Whenever any person interferes with the right of any other person to vote or to vote as he may choose, he acts like a political termite to destroy a part of that foundation. A single termite or many termites may pass unnoticed, but each damages the foundation, and if that process is allowed to continue the whole structure may crumble and fall even before the occupants become aware of their peril. Eradication of political termites, or at least checking their activities, is necessary to prevent irreparable damage to our Government. On the other hand, the temporary postponement of trial of a misdemeanor case before a justice of the peace causes either no injury or very slight injury. . . . " 295 F. 2d at 784-785.

CONCLUSION

The writ of certiorari should be granted to review and reverse the judgment of the Court of Appeals.

Respectfully submitted,

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APPENDIX I

ORDER

[Caption omitted]

Upon consideration of the verified petition for writ of habeas corpus, it is,

ORDERED:

That the petition be and it hereby is denied for failure to exhaust available state remedies. 28 U. S. C. § 2254; *In re Wyckoff*, 196 F. Supp. 515 (S. D. Miss. 1961), 6 Race Relations L. Rptr. 786, petition for immediate hearing and for leave to proceed on original papers denied, *id.* at 793 (5th Cir. 1961), petition for habeas corpus denied, *id.* at 794 (Circuit Justice Black, with whom Mr. Justice Clark concurs, 1961); *Brown* v. *Rayfield*, 320 F. 2d 96 (5th Cir. 1963), cert. denied 375 U. S. 902 (1963).

This the 5th day of January, 1965.

/s/ CLAUDE F. CLAYTON
Claude F. Clayton,
District Judge

APPENDIX II

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 22241

JAN HILLEGAS,

Appellant,

—versus—

JOE SAMS, JR., County Attorney for Lowndes County, Mississippi, *et al.*,

Appellees.

Appeal from the United States District Court for the Northern District of Mississippi

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(August 16, 1965.)

Before:

JONES and BROWN, *Circuit Judges,* and SHEEHY, *District Judge.*

JONES, *Circuit Judge*: The appellant, Jan Hillegas, brought a habeas corpus proceeding in the United States

District Court for the Northern District of Mississippi claiming she was detained by the appellees unlawfully and in violation of Federally guaranteed rights. The facts herein recited are as set forth in her petition and, for the purposes of the case, are assumed to be true. The appellant is a white woman, twenty-one years of age, and went to Lowndes County, Mississippi from Syracuse, New York. In Mississippi she was associated with the Congress of Federated Organizations (COFO) in assisting Negroes in their efforts to register to vote. COFO arranged for her meals and lodging. Such money as she needed was supplied by her mother. While in the county courthouse of Lowndes County at Columbus, Mississippi, sitting on a bench with two other COFO workers, the appellant and her companions were told by a deputy of the appellee, Sheriff Taylor, to leave the courthouse and that if they did not leave he would arrest them. They did not leave and he arrested them, took them to the Sheriff's office where they were told they were charged with vagrancy. Appellant and her companions attempted, by a show of currency and other means, to persuade the deputy sheriff that they were not vagrants. Their efforts produced no results and they were confined in the county jail. Other efforts, equally unavailing, were made to procure appellant's release. She then filed a petition for habeas corpus in the United States District Court which was denied. This appeal is from the order of the district court, which based its order upon failure to exhaust available state remedies. No effort was made to obtain relief in the courts of Mississippi. Nothing is here shown to call for the application of a different rule than was announced and applied in *Brown* v. *Rayfield,* 5th Cir. 1963, 320 F. 2d 96, cert. den. 375 U. S. 902, 84 S. Ct.

191, 11 L. Ed. 2d 143, and in the case of *In re Wykcoff*, 6 Race Rel. L. Rep. 786, 793, which is discussed in *Brown* v. *Rayfield*. The principles announced in those cases sustain the decision of the district court and its judgment is

AFFIRMED.

BROWN, *Circuit Judge*, concurring:

I concur, but solely because *Brown* v. *Rayfield*, so long as it stands, squarely rules this case. But, with deference, that decision, the victim of inadequate presentation, is, I think, wrong and ought to be reversed.

Petitioner Hillegas' petition, seeking federal habeas corpus relief pursuant to 28 USCA § 2241, alleges in unequivocal, factually detailed, language that she is held[1] in state custody in violation of her federal constitutional right. Applying *Conley* v. *Gibson*, 1957, 355 U. S. 41, 78 S. Ct. 99, 2 L. Ed. 2d 80, as we must, this means that the Court holds that prosecution and trial by a state to effectuate unconstitutional race discrimination is not an "extraordinary" case. I can imagine nothing more extraordinary.

Parts I-VI of the petition describe Miss Hillegas, her resources, her work for COFO in Lowndes County in assisting Negroes in confirming their voting rights in the face of past discrimination by the County Registrar under the color of Mississippi law and constitutional provisions, noting particularly that the Lowndes County Registrar was a named party in the Government's massive assault on these provisions and practices in *United States* v. *Mississippi*, S. D. Miss. (3-Judge), 1964, 229 F. Supp. 925,

[1] She was subsequently released on bond.

reversed, 1965, —— U. S. ——, —— S. Ct. ——, 13 L. Ed. 2d 717. Then in Part VII, it is specifically asserted: (1) If the Mississippi vagrancy statute[2] is construed to apply to her conduct, it would be violative of her "freedom of speech, of association and assembly (U. S. CONST. Amends. I, XIV), of her federal privilege to disseminate information pertinent to registration and voting in national elections, and to encourage and support Negro citizens of Mississippi to register and vote in national elections (U. S. CONST., Amend. XV)," and (2) if the vagrancy statute is construed to save its constitutionality, "there is no evidence to support the charge * * * consistently with due process of law (U. S. CONST., Amend. XIV)."[3]

It is next asserted that her arrest and detention is for the purpose of deterring her from exercising the constitutional rights previously mentioned, and Negro citizens from seeking to secure their constitutional franchise. In Part VIII, all of this is said to be pursuant to a state wide practice of segregation, subscribed to by all public officials —including state judges who are popularly elected. She candidly and expressly acknowledges that no attempt was made to exhaust state remedies, maintaining this to be unnecessary in light of the facts alleged.

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[2] Miss. Code Ann. § 2666:

"The following persons are and shall be punished as vagrants, viz: * * *

"(c) All persons able to work, having no property to support them, and who have no visible or known means of fair, honest, and reputable livelihood. * * *"

[3] The authorities supporting (2) as a serious constitutional issue have been recently reviewed by Chief Justice Warren in his dissent from the Supreme Court's refusal to hear Drew v. Maryland, 1965, —— U. S. ——, —— S. Ct. ——, —— L. Ed. 2d —— [No. 1010, June 1, 1965, 33 L. W. 3385].

The District Court disagreed and, without holding an evidentiary hearing, dismissed for lack of exhaustion, relying on *In re Wycoff* and *Brown* v. *Rayfield,* cited in the Court's opinion, *supra.* Both of those cases held that a case for the exception to the exhaustion requirement of 28 USCA § 2254 had not been made out. From an examination of these cases, and particularly a close reading of the briefs filed in *Brown,* it is apparent that the Court did not there have before it the same rich historical materials on the intent of Congress in passing the Act of 1867 (the forerunner of § 2241) and the early court decisions interpreting it, relative to the extent of the availability of pre-trial federal habeas relief, set forth in Appellant's lengthy, scholarly, completely annotated brief filed by Professor Anthony Amsterdam.[4]

How *Wycoff* ever got into *Brown* is a mystery.

Wycoff is simply inapposite. Being an application for *post* conviction habeas relief, the case was put and argued as to whether that case came within the exception to the exhaustion requirement of § 2254—"that there is either an absence of available State corrective process *or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner.*" Section 2254, however, has nothing to do with our case. This is so because that section, in requiring exhaustion as a general rule, has to do only with those "in custody pursuant to the *judgment of a State court* * * *." It necessarily relates solely to post-conviction habeas.

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[4] These materials are substantially duplicated in Professor Amsterdam's recent article, Criminal Prosecutions Affecting Federally Guaranteed Civil Rights: Federal Removal and Habeas Corpus Jurisdiction to Abort State Court Trial, 113 U. Pa. L. Rev. 793, 805-912 (1965).

Here we have a pre-trial petition, uncluttered by any state court judgment. Statutory restrictions on post-conviction habeas are not really pertinent. But this is where *Brown* v. *Rayfield* complicates the matter. For that case, as in the one before us, involved a pre-trial application for habeas relief for an arrest and confinement and under similar circumstances.[5] Relying, as any good Court ought to do, on the earnest, but historically incomplete presentations of counsel who mistakenly urged that the case was one coming within the exception to § 2254 (applicable only to post conviction), the Court followed *Wycoff* holding that under § 2254, exhaustion was necessary. Examining it wholly from the typical exhaustion point of view, the Court stopped short of considering whether the petitioner should be allowed to make proof in an appropriate hearing of his allegation that the prosecution was instituted for a racially discriminatory purpose, and that he could not get a fair trial.[6]

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[5] The petition in *Brown* v. *Rayfield* alleged that petitioners, while walking single file carrying signs protesting segregation, were arrested and detained for "parading without a permit."

[6] This is quite different from the approach taken by this Court with regard to removal, 28 USCA § 1443(1), whereunder similar allegations are often made. In Peacock v. City of Greenwood, Mississippi, 5 Cir., 1965, —— F. 2d —— [No. 21655, June 22, 1965], holding that a petition for removal alleging discriminatory application of a facially valid state statute (same issue as here) was sufficient for removal, entitling the petitioner to establish factually his charge that the prosecution was undertaken for racially discriminatory purposes. (See discussion of Rachel v. State of Georgia, infra.) Emphasizing that the decision went only to the right to be heard on the jurisdictional facts, the Court stated:

> "Of course, such allegations must be proved if challenged. Consequently, removal based on misapplication of a statute may fail for want of proof. However, we deal here only with what allegations are sufficient to prevent remand without a

Professor Amsterdam points out the exhaustion requirement relative to pre-trial habeas petitions is a court-made doctrine flowing from *Ex parte Royall,* 1886, 117 U. S. 241, —— S. Ct. ——, —— L. Ed. ——, designed to curb pre-trial abuses of the writ. He argues convincingly that in spite of *Royall* and its progeny, Congress, in passing the Habeas Act in 1867, intended and the Courts have accorded, substantial utilization of the writ as a pre-trial remedy—in extraordinary circumstances. The question, therefore, is whether the category of cases which Professor Amsterdam advisedly terms "civil rights cases,"[7] or perhaps more narrowly those where the petitioner is, contrary to his federal constitutional rights, being prevented from assisting in the ongoing of an important federal interest—such as voter registration—is the kind of extraordinary case, as to which Congress intended and the courts have allowed, pre-trial federal habeas relief. This question, far more complicated and serious than made to appear in *Brown* v. *Rayfield,* deserves a considered answer not in the darkness of that unillumined presentation but in the full light of these historical-juridical materials which are a classic of legal literature though unpersuasive here.

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hearing." The allegation was "that Mississippi Code § 2296.5 [obstruction of public streets] is being applied against [the petitioners] for purposes of harassment, intimidation, and as an impediment to their work in the voter registration drive, thereby depriving them of equal protection of the laws." —— F. 2d at ——.

But as in *Rachel,* determination (after hearing) that the case is removable automatically resolves the issue and forbids the state criminal trial. This allegation is, of course, precisely made in the case before us.

[7] See Amsterdam, supra, note 3, at 804.

Any such reassessment will demonstrate that the same factors are at work in parallel systems of effective federal redress against state inspired, state caused, state permitted, instances of unequal treatment.

Dombrowski v. *Phister*, 1965, —— U. S. ——, —— S. Ct. ——, 14 L. Ed. 2d 22, involves the role of the injunction pursuant to 42 USCA § 1983. There plaintiffs sought to enjoin the anticipated enforcement of state subversive activity control statutes against their free expression activities aimed at the advancement of Negro civil rights. Must we not say here, as did the Supreme Court in *Dombrowski* in distinguishing the usual non-injunction rule of *Douglas* v. *City of Jeanette*, 1943, 319 U. S. 157, 63 S. Ct. 877, 87 L. Ed. 1324, that "the allegations in this complaint depict a situation in which defense of the State's criminal prosecution will not assure adequate vindication of constitutional rights. They suggest that a substantial loss or impairment of freedoms of expression will occur if appellants must await the State court's disposition and ultimate review in this Court of any adverse determination. These allegations, if true, clearly show irreparable injury. * * * Because of the sensitive nature of constitutional expression, we have not required that all of those subject to overbroad regulations risk prosecution to test their rights." 14 L. Ed. 2d at 28. In *Dombrowski*, as here, the motive for the prosecution was challenged, and with the factor present in the allegations that the arrest, confinement and prosecution is really part of a scheme of harassment, the prospect of eventual success in the state courts or correction in the Supreme Court is an inadequate protection of the constitutional right to free expression. 14 L. Ed. 2d 29.

In 1961 we took similar action in *United States* v. *Wood*, 5 Cir., 1961, 295 F. 2d 772, where prosecution of the alleged assailant was enjoined because of its disruptive effect on others then seeking to exercise constitutional rights (voter registration).

More recent is *Rachel* v. *State of Georgia*, 5 Cir., 1965, 342 F. 2d 336, involving the civil rights removal statute, 28 USCA § 1443. Since a "statute", as construed by this Court, was alleged to be one of the causes of discrimination, the case came within the traditional grounds for removal, *Kentucky* v. *Powers*, 1906, 201 U. S. 1, 26 S. Ct. 387, 50 L. Ed. 633; *State of Virginia* v. *Rives*, 1879, 100 U. S. 313, 25 L. Ed. 667. Going even further is *Peacock* v. *City of Greenwood, Mississippi*, June 22, 1965, note 6, *supra*, in which we held "that a good claim for removal under § 1443(1) is stated by allegations that a state statute has been applied prior to trial so as to deprive an accused of his equal civil rights in that the arrest and charge under the statute were effected for reasons of racial discrimination." —— F. 2d at ——.

And this was given full voice by us in *Cox* v. *Louisiana*, 5 Cir., June 29, 1965, —— F. 2d —— [No. 22657], in which we granted a stay pending appeal to prevent state prosecution charged to have been initiated to "harass and punish citizens for the exercise of their constitutional rights. * * *" —— F. 2d at ——.

Pointing to the congressional view and the receding scope we give to the *Douglas* v. *City of Jeanette* comity concept in the face of the use of the laws machinery as the engine of racial denials is *Dilworth* v. *Riner*, 5 Cir., 1965, 343 F. 2d 226. In an extended opinion authored by

Judge Bell, we declared that the Civil Rights Act of 1964 overrode the general comity statute, 28 USCA § 2283, to permit injunctions against state prosecutions for actions which were constitutionally protected.

Thus we have now passed the point where Federal Courts can refuse to hear evidence in support of a factually detailed claim that a state criminal prosecution has been initiated to effectuate racially motivated denial of constitutional rights. By civil injunction and removal we recognize that this much interference with state criminal prosecutions is the price we pay under the Supremacy Clause.[8]

In doing so we conclude that the situation is "extraordinary" and therefore calls for extraordinary relief. That the Great Writ which is always free of technical impediments is now relegated to a second class role is a surprise. All the more is my surprise that we can hold that deliberate, purposeful use by the State of its criminal machinery to wreak denials of constitutional rights is not an "extraordinary" case.

Brown v. *Rayfield* may be the latest, but it cannot be the last word on this vital question.

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[8] I recognize that with removal and civil injunction being less peremptory, a Court might well defer action on a habeas petition pending use of these flexible devices. Likewise, availability of such devices might, after a hearing to resolve the truth of the charges, permit some discretion in denial or deferment of the writ.

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

October Term, 1964

No. 22241

D. C. Docket No. EC-65-L

JAN HILLEGAS,

Appellant,

—versus—

JOE SAMS, JR., County Attorney for Lowndes County, Mississippi, *et al.*,

Appellees.

Appeal from the United States District Court for the Northern District of Mississippi

---

Before:

JONES and BROWN, *Circuit Judges,* and SHEEHY, *District Judge.*

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Mississippi, and was argued by counsel;

Judgment

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed;

IT IS FURTHER ORDERED AND ADJUDGED that the appellant, Jan Hillegas, be condemned to pay the costs of this cause in this Court for which execution may be issued out of the said District Court.

BROWN, *Circuit Judge,* Concurs Specially

August 16, 1965

Issued as Mandate:

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 22241

JAN HILLEGAS,

Appellant,

—versus—

JOE SAMS, JR., County Attorney for Lowndes County, Mississippi, *et al.*,

Appellees.

Appeal from the United States District Court for the Northern District of Mississippi

---

ON PETITION FOR REHEARING

(September 27, 1965)

Before:

JONES and BROWN, *Circuit Judges,* and SHEEHY, *District Judge.*

PER CURIAM:

IT IS ORDERED That the petition for rehearing in the above entitled and numbered cause be, and the same is hereby DENIED.

APPENDIX III

Petition for Writ of Habeas Corpus With Motion for Stay of State Court Proceedings

[Caption omitted]

Filed January 5, 1965

To: *Honorable Claude F. Clayton, District Judge, United States District Court for the Northern District of Mississippi*:

Petitioner's verified petition and motion respectfully aver that;

I.

The jurisdiction of this court is invoked under 28 U. S. C. § 2241 (1958) to release petitioner Jan Hillegas from the custody of respondents Joe Sams, Jr., County Attorney of Lowndes County, Mississippi; Penn Taylor, Sheriff of Lowndes County, Mississippi and Custodian of the County Jail of Lowndes County, Mississippi, who now hold petitioner confined in that jail, in the city of Columbus, Mississippi, within the Northern District of Mississippi, in violation of the Fourteenth and Fifteenth Amendments to the Constitution of the United States. Pursuant to 28 U. S. C. § 2251 (1958), the court is authorized to stay state proceedings against petitioner for matters involved in this habeas corpus proceeding.

II.

On December 28, 1964, petitioner was arrested by respondent Taylor or his deputies and agents. Respondents

now hold petitioner under authority of an affidavit and warrant charging petitioner with the offense of vagrancy, Miss. Code Ann. § 2666 (Recomp. Vol. 1956). A copy of the affidavit and warrant has been refused petitioner's employer by respondent Taylor. Petitioner is held for appearance and trial before the justice of the peace of Lowndes County, Mississippi, January 6, 1965, on the charges set out in the affidavit and warrant. Respondent Taylor has set bail in the amount of $200. Petitioner has not made bond.

III.

(A) Petitioner is a 21-year-old girl, white, a college graduate, domiciled in Syracuse, New York. The Council of Federated Organizations (hereafter COFO) is an association of civil rights and local citizenship groups working in Mississippi to achieve by peaceful and lawful means the equal civil rights of Negroes and all persons and to educate, assist and encourage Negroes to register and vote in local, state and national elections free of racial discrimination and racial disenfranchisement forbidden by the Fourteenth and Fifteenth Amendments. COFO has employed, does employ and will employ petitioner continuously as a voter registration worker in the State of Mississippi. (Allegations in this part III that anything "has" been done mean that it has been done at all times after the date of petitioner's entry into Mississippi, including but not limited to the period prior to her arrest, December 28, 1964). Petitioner's duties for COFO consist of interviewing Negro citizens of Mississippi for the purpose of encouraging, assisting and educating them to register to vote, of accompanying Negroes to

the place of voting registration for the purpose of supporting their efforts to register free of racial discrimination, of observing conduct by state officials or other persons calculated to racially disenfranchise Negroes in violation of the Fourteenth and Fifteenth Amendments, and of participating in the administration of COFO's program having the objectives described above.

(B) In connection with her employment by COFO, petitioner is presently resident in the State of Mississippi for a period of more than six months.

(C) In consideration of and partial payment for her work, COFO has arranged that petitioner live without expense to herself in the home of Reverend Wheadon, a well-known, respected retired Negro minister in Columbus, Mississippi. Prior to and at the time of her arrest, December 28, 1964, petitioner was living in Reverend Wheadon's home, 802 N. 14th Street, Columbus, Mississippi. Her accommodations in Reverend Wheadon's home have remained available to her following her arrest, and she would presently be living there but for her confinement by respondent.

(D) Also in consideration of and partial payment for her services, COFO has supplied, does supply, and will supply petitioner all her meals without expense to herself during her residence in Mississippi, and further has assumed, does assume and will assume responsibility for supplying petitioner during her stay in Mississippi her support, maintenance, and reasonable livelihood, including all things necessary to sustain her as a reputable member of the community.

(E) Independently of COFO, petitioner's mother, Mrs. Estella Hillegas, of Syracuse, New York, has supplied, does supply, and will supply petitioner with money sufficient to sustain her as a reputable member of the community, and has assumed, does assume, and will assume responsibility to supply petitioner sufficient income for her support and maintenance during her residence in Mississippi.

IV.

(A) December 28, 1964, in the course of her employment for COFO, petitioner was present in the county courthouse for Lowndes County in Columbus, Mississippi, together with two other COFO workers, whose duties were similar to petitioner's, Dennis Gaston and Dove Green. Petitioner, Gaston and Green were engaged in directing Negroes who desired to register to vote in local, state and national elections into the office of the county registrar for Lowndes County; in assuring such Negroes, to the best of their ability, against intimidation and harassment designed to dissuade Negro voter registration by reason of race in violation of the Fourteenth and Fifteenth Amendments and 42 U. S. C. A. § 1971 (1963 Supp.), 42 U. S. C. §§ 1983, 1985 (1958); and in interviewing Negroes who had presented themselves to the county registrar for voting registration, for the purpose of ascertaining whether the registrar was complying with his obligation under the cited provisions of federal law to register such Negroes without discrimination by reason of race.

(B) While engaged in the foregoing activities, and conducting themselves at all times in a lawful, quiet and orderly

manner, petitioner, Gaston and Green were seated on a bench or seat outside the office of the Circuit Clerk in the county courthouse. Circuit Clerk Wiggins came out of the office and asked what they were doing there. They replied that they were there to aid and give moral support to the Negroes who were attempting to register to vote. Circuit Clerk Wiggins told them to make themselves comfortable.

(C) Shortly thereafter, petitioner, Gaston and Green were approached at the same place by a Deputy Sheriff of Lowndes County, an agent of respondent Taylor, whose name is believed to be Herrin and who will hereafter be so referred to. Herrin asked petitioner and her companions the same questions which they had been asked by Circuit Clerk Wiggins and they gave him the same answer. Herrin then told them that they would have to leave. They replied that they had a right to remain in the courthouse. Herrin said that if they did not leave he would arrest them. Then, without giving them an opportunity to move or reply, he told them to come with him. They asked if they were under arrest. He said they were. They asked for what offense. Herrin said for creating a public disturbance; that the people in the offices were complaining that they could not work with the three COFO workers there.

(D) Petitioner, Gaston and Green accompanied Herrin to the Sheriff's office in the courthouse. There they were told that they were charged with vagrancy or suspicion of vagrancy. Each of the three workers offered to show Herrin a form, hereafter referred to as a vagrancy form, prepared by COFO for the purpose of identifying COFO employees.

Petitioner's vagrancy form contained her name and address, and stated the fact of her employment by COFO. Petitioner also offered to show Herrin an amount of paper money, but Herrin refused to look at the vagrancy forms of any of the three workers or at petitioner's money. Petitioner, Gaston and Green were thereupon charged with vagrancy and incarcerated in the Lowndes County Jail on that charge.

V.

On or about December 29, 1964, Cephas Hughes, an authorized representative of COFO, accompanied by Reverend Tom Lasswell and Rev. Albert Cohen, went to respondent Sams in Sams' office to attempt to obtain the dropping of the vagrancy charges against the three arrested COFO workers. After Sams had been informed that Gaston was a full time student in California and was planning to leave Mississippi for California on the following day, Sams agreed to drop charges against Gaston, phoned the jail and ordered Gaston's release. With respect to petitioner, Hughes informed Sams that petitioner was a New York domiciliary, a college graduate, and a COFO employee; that she lived in the neighborhood with Reverend Wheadon, and that her meals and necessaries were supplied by COFO. Hughes also showed Sams a wire, a facsimile of which is attached as Exhibit I to this petition, dated December 28, 1964, from Mrs. Estella Hillegas of Syracuse, New York, stating that as petitioner's mother Mrs. Estella Hillegas had assumed and would continue to assume responsibility to supply her daughter all her decent needs as a member of

the community while in Mississippi. After being so informed, Sams refused to drop charges against petitioner. Hughes similarly gave Sams information that Green was a COFO employee whose lodging, board and necessaries were supplied by COFO but Sams similarly refused to drop charges against Green. Hughes thereupon went to respondent Taylor at the jail and asked for a copy of the affidavits and warrants against petitioner and Green, which request respondent Taylor refused.

VI.

(A) Now and during many years past, the registrar of Lowndes County is discriminatorily denying and has discriminatorily denied Negroes the right to register to vote by reason of their race. He has done so under color of Miss. Const., art. 12, §§ 241-A and 244, provisions which on their face and in their discriminatory application by him violate the Fourteenth and Fifteenth Amendments and the commands of 42 U. S. C. A. § 1971 (1963 Supp.), 42 U. S. C. §§ 1983, 1985 (1958). The United States of America has brought suit against the registrar of Lowndes County and others to enjoin these discriminatory and unconstitutional practices, which suit is presently pending in the Supreme Court of the United States. *United States* v. *Mississippi*, 229 F. Supp. 925 (S. D. Miss. 1964), *probable jurisdiction noted*, 377 U. S. 988 (1964). In 1961, the voting age population of Lowndes County was: White, 16460; Negro, 8362. There were 5869 registered white voters and 63 registered Negro voters. These figures have not significantly changed since that date.

(B) It is the purpose of COFO and of petitioner as an employee of COFO to assist, encourage and educate Negro citizens and residents of Lowndes County to register to vote and vote in local, state and national elections.

VII.

Petitioner is presently in custody in violation of the Fourteenth and Fifteenth Amendments because:

(A) the charge on which she is held is unconstitutional as applied to petitioner, for (1) is MISS. CODE ANN. § 2666 (Recomp. Vol. 1956) applies to persons engaged in the activities in which petitioner is engaged, and supported and maintained as petitioner is supported and maintained, it deprives her of freedom of speech, of association and assembly (U. S. CONST., Amends. I, XIV), of her federal privilege to disseminate information pertinent to registration and voting in national elections, and to encourage and support Negro citizens of Mississippi to register and vote in national elections (U. S. CONST., Amend. XV), while (2) if MISS. CODE ANN. § 2666 is construed and applied so as to save its constitutionality, there is no evidence to support the charge against petitioner consistently with due process of law (U. S. CONST., Amend. XIV).

(B) petitioner's detention and prosecution has the design and effect of harassing and punishing petitioner for attempting to assist Negroes to register to vote, of deterring and intimidating petitioner from continuing to exercise her rights described para. IV(A) *supra*, and of deterring Negro citizens of Lowndes County from attempting to register to

vote, thereby depriving such Negroes of the franchise by reason of race, in violation of the Fifteenth Amendment and 42 U. S. C. A. § 1971 (1963 Supp.), 42 U. S. C. §§ 1983, 1985 (1958).

(C) petitioner was arrested and is now detained without probable cause to believe that she was committing or had committed any offense, in violation of the Fourth and Fourteenth Amendments.

(D) on information and belief, the Lowndes County Jail, pursuant to MISS. CONST., § art. 11, § 225 and MISS. CODE ANN. §§ 4259, 7965 (Repl. Vol. 1956), maintains segregated facilities for the white and Negro races, in violation of the Fourteenth Amendment.

VIII.

Petitioner has made no attempt to exhaust her state remedies. She need not do so because the prosecution against her implicates the authority and operations of the federal government by harassing petitioner in her voter registration activities described above and by deterring her from continuing those activities and Negro citizens from attempting to register to vote. This deterrence and harassment is pursuant to a state-wide policy of the officials and public agencies of the State of Mississippi to maintain racial discrimination in all phases of life in violation of the Fourteenth Amendment and in voting in violation of the Fifteenth and Seventeenth and Art I, § 2 of the federal Constitution. Such a policy is evident on the face of the statutes of the State of Mississippi which this court may judicially

notice, particularly MISS. CODE ANN. §§ 4065.3, 2056(7) (Repl. vols. 1956), and itself implicates the authority and operations of the federal government. Further, state remedies are ineffective to protect petitioner's rights because the pendency of her prosecution in the state courts *dies in diom* intimidates and represses her in the exercise of her First, Fourteenth and Fifteenth Amendment freedoms and intimidates and represses Negro citizens of Lowndes County in the exercise of their voting rights under Art. I, § 2 and the Fifteenth and Seventeenth Amendments. Judicial remedies in the Mississippi courts are also ineffective because the judges of those courts, and particularly the justice of the peace and circuit judge of Lowndes County are elected officials politically responsible to an electorate from which Negroes have been systematically excluded and which is hostile to Negro voter registration and to civil rights activity generally.

IX.

No previous application to this court or to any federal court or judge has been made for a writ of habeas corpus on the grounds alleged herein.

WHEREFORE, petitioner prays the court as follows:

(1) that the court forthwith issue the writ or a rule to show cause, in compliance with 28 U. S. C. § 2243, para. 1 (1958), returnable within as short a time as may appear practicable, and in no event later than three days hence, in compliance with 28 U. S. C. § 2243, para. 2 (1958);

Petition for Writ of Habeas Corpus With Motion for Stay of State Court Proceedings

(2) that a hearing forthwith be set for as early a date as pacticable, and in no event later than five days after the return day in compliance with 28 U. S. C. § 2243, para. 4 (1958);

(3) that after hearing this court release petitioner from her unconstitutional confinement by respondents and discharge her from all further prosecution in any Mississippi court for the matters involved in this petition; and

(4) that pending final disposition of this proceeding,

(A) this court release petitioner on her own recognizance or on such reasonable bail as the court may set; and

(B) pursuant to 28 U. S. C. § 2251 (1958) this court stay all proceedings in any Mississippi court against petitioner for the matters involved in this petition.

/s/ HENRY ARONSON
Henry Aronson
507½ N. Farish Street
Jackson, Mississippi

/s/ ANTHONY G. AMSTERDAM
Anthony G. Amsterdam
3400 Chestnut Street
Philadelphia, Pa. 19104
Counsel for Petitioner

Of Counsel:

Jack H. Young
Carsie A. Hall
R. Jess Brown

(Duly verified.)

EXHIBIT I ANNEXED TO PETITION

WESTERN UNION
TELEGRAM

NSA007 SYA005 1964 DEC 29 AM 8 08

SY LLB049 NL PD=SYRACUSE NY 28=
WILLIE ERVIN, PROJECT DIRECTOR=
1212 17 ST NORTH (DLR DONT FONE)
COLUMBUS MISS=

TO WHOM IT MAY CONCERN I THE MOTHER OF JAN HILLEGAS HAVE ASSUMED AND WILL CONTINUE TO ASSUME FULL RESPONSIBILITY FOR PROVIDING MY DAUGHTER JAN HILLEGAS ALL HER DECENT NEEDS TO MAINTAIN HER AS A RESPECTABLE MEMBER OF THE COMMUNITY OF COLUMBUS MISSISSIPPI OR ANY OTHER PLACE SHE MAY DESIRE TO RESIDE=

MRS. ESTELLA H. HILLEGAS.

NOTICE OF MOTION

PLEASE TAKE NOTICE that the undersigned attorney for petitioner will bring the attached motions for bail and for stay of state court proceedings before the United States District Court for the Northern District of Mississippi, Eastern Division, at the time of filing the attached petition for writ of habeas corpus, on the 5th day of January, 1965 at 1:30 (p.m.), or as soon thereafter as counsel can be heard.

/s/ HENRY ARONSON
Counsel for Petitioner

Motion for Bail and for Stay of State Court Proceedings

Upon the verified petition for habeas corpus and the attachments thereto, petitioner respectfully moves the court:

(1) to order petitioner's release forthwith on her own recognizance or reasonable bail during the pendency of this proceeding and until its final disposition;

(2) to stay proceedings against petitioner in any state court of Mississippi for any matter involved in this petition during the pendency of this proceeding and until its final disposition.

Respectfully submitted,

/s/ Henry Aronson
Counsel for Petitioner

Form Order

[Omitted]

Office Supreme Court, U.S.
FILED
FEB 15 1966
JOHN F. DAVIS, CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1965

No. 704

JAN HILLEGAS,
Petitioner,

vs.

JOE SAMS, JR., COUNTY ATTORNEY FOR LOWNDES COUNTY, MISSISSIPPI, AND PENN TAYLOR, SHERIFF AND CUSTODIAN OF THE COUNTY JAIL OF LOWNDES COUNTY, MISSISSIPPI,
Respondents.

[redacted]

RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

JOE SAMS, JR.
Attorney at Law
Columbus, Mississippi

JOE T. PATTERSON
Attorney General of the State of Mississippi

WILLIAM A. ALLAIN
Assistant Attorney General of the State of Mississippi
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RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

FACTS

The Petition for a Writ of Habeas Corpus in this matter was filed on January 5, 1965, by Jan Hillegas alleging that she is a resident of Syracuse, New York, and is unlawfully and unconstitutionally restrained of her liberty by Joe Sams, Jr., County Attorney for Lowndes County, Mississippi, and Penn Taylor, Sheriff of Lowndes County, Mississippi, and Custodian of the Lowndes County Jail.

Petitioner was arrested by R. C. Herron, Chief Deputy of Respondent Taylor on December 28, 1964. An affidavit was made by the said arresting officer charging the Petitioner with the offense of vagrancy. Mississippi Code Annotated, Section 2666. Bond was set by the Respondent Taylor at $200.00, which Petitioner did not make. Petitioner was arrested with Dennis Gaston and Dove Green. Upon independent investigation by the Respondents, the said Gaston was found to be a college student and therefore was released without charge. Trial in the Municipal Court of Columbus, Mississippi was set for December ...., 1964. On December ...., 1964, Federal District Judge Claude F. Clayton of the Northern District of Mississippi informed Respondent Joe Sams, that counsel for Petitioner had discussed with him the filing of a Petition for Writ of Habeas Corpus and requested a date for hearing on said Petition. Said Judge further informed Respondent Sams that he could not hear counsel on said Petition before January 5, 1965 and requested the said Sams not to re-set the said trial in

the Municipal Court until after said hearing. Said Respondent Sams, without hesitation and in full co-operation with the said District Judge, re-set said hearing on January 6, 1965. Said Petition for Writ of Habeas Corpus was filed on January 5, 1964, and on that day denied by the said District Court on the ground that Petitioner had failed to exhaust State remedies. Again, the said District Court discussed this matter with the Respondent Sams, requesting that the said Sams stay any and all proceedings against the Petitioner until the Court of Appeals for the Fifth Circuit had acted upon the appeal of said Petitioner. Again, without hesitation and in full co-operation with the District Judge, the said Sams continued the trial of Petitioner until final decision by this Court and *further released said Petitioner on her own recognizance.*

Petitioner admits that she had not exhausted all available State remedies and in fact she has not exhausted any of said remedies.

ARGUMENT

A District Court of the United States Is Precluded from Granting an Application for a Writ of Habeas Corpus in Behalf of a Person in Custody for Violation of a State Statute Unless It Appears That the Applicant Has Exhausted the Remedies Available in the Courts of the State.

I.

Statutory Provision

Title 28, U.S. Code Annotated, Section 2254, provides:

"An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State Court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State, or that there is either an ab-

sence of available State corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner.

An applicant shall not be deemed to have exhausted the remedies available in the courts of the State within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented."

II.

Case Law

We respectfully submit that Petitioner is without standing before this Court in this proceeding, having exhausted none of the many remedies available to her in the Courts of the State of Mississippi. Her allegation that she has not taken advantage of the remedies available in the State Courts because any such efforts would be unsuccessful are either a conclusion without basis of fact or it is an admission that she is guilty of the offense for which she was arrested.

Petitioner actually plead herself out of Court in this proceeding by admitting in her petition that she has not exhausted her remedies available in the State Courts without alleging any legal justification for her failure so to do. The rule is clearly stated by the Supreme Court of the United States in *Davis* v. *Burke*, 179 U.S. 399, 45 L. Ed. 249, as follows:

"The rule is well settled in this Court that, while there may be a power on the part of the Federal Courts to issue a writ of habeas corpus where the petitioner insists that he has been deprived of his liberty without due process of law, that power will not ordinarily be exercised until after an appeal made to the state courts has been denied."

* * * * *

"The state courts are as much bound as the Federal courts to see that no man is punished in violation of

the Constitution or laws of the United States; and ordinarily an error in this particular can better be corrected by this court upon a writ of error to the highest court of the state than by an interference which is never less than unpleasant, with the procedure of the state courts before the petitioner has exhausted his remedy there."

* * * * *

"... not only does the question involve the construction of the Constitution and laws of the state with which the supreme court of the state is entirely familiar, but a ruling by this court that prosecutions by information in the courts of Idaho are invalid might result in the liberation of a large number of persons under sentence upon convictions obtained by this method of procedure. *A step so important ought not to be taken without full opportunity given to the state court to pass upon the question, and without clear conviction of its necessity.*"

In *Ex Parte Henry Hawk*, 321 U.S. 114, 88 L. Ed. 572, Petitioner was convicted of murder in the State Courts of Nebraska. His conviction was affirmed by the Nebraska Supreme Court, and certiorari was denied by the Supreme Court of the United States. Petitioner filed a petition for Habeas Corpus with the Nebraska Supreme Court, and same was denied. He did not file a petition for Habeas Corpus in any lower Court in Nebraska and did not appeal from any adverse ruling of such Court to the Nebraska Supreme Court. He did not seek in the State Courts of Nebraska a Writ of Error Coram Nobis. In denying his application for a Writ of Habeas Corpus, the Supreme Court of the United States said:

"In the application now before us, and in those filed with the United States District Court and the senior Circuit Judge of the Eighth Circuit, petitioner alleges, among other things, that the state court forced him into trial for a capital offense, Neb. Comp. Stat. Sec. 28-401, with such expedition as to deprive him of the

effective assistance of counsel, guaranteed by the due process clause of the Fourteenth Amendment, . . . and that his conviction was based in part of the introduction at the trial of evidence known by the prosecution to be perjured."

* * * * *

"But, as was pointed out by the District Court and Circuit Judge, petitioner has not yet shown that he has exhausted the remedies available to him in the state courts, and he is therefore not at this time entitled to relief in a federal court or by a federal judge."

* * * * *

"Ordinarily an application for habeas corpus by one detained under a state court judgment of conviction for crime will be entertained by a federal court only after all state remedies available, including all appellate remedies in the state courts and in this Court by appeal or writ of certiorari, have been exhausted. Tinsley v. Anderson, 171 U.S. 101, 104, 105, 43 L. Ed. 91, 96, 18 S. Ct. 805; Urquhart v. Brown, 205 U.S. 179, 51 L. Ed. 760, 27 S. Ct. 459; United States ex rel. Kennedy v. Tyler, 269 U.S. 13, 70 L. Ed. 138, 46 S. Ct. 1; Mooney v. Holohan, supra (294 U.S. 115, 79 L. Ed. 795, 55 S. Ct. 340, 98 ALR 406); Ex Parte Abernathy, No. ....., October 18, 1943 (320 U.S. 219, ante, 1, 64 S. Ct. 13)."

* * * * *

"As petitioner does not appear to have exhausted his state remedies his application will be denied without prejudice to his resort to the procedure indicated as appropriate by this opinion."

In *Stack* v. *Boyle,* 342 U.S. 1, 96 L. Ed. 3, the Court said:

"In this case, however, petitioners did not take an appeal from the order of the District Court denying their motion for reduction of bail. Instead, they pre-

sented their claims under the Eighth Amendment in applications for writs of habeas corpus. While habeas corpus is an appropriate remedy for one held in custody in violation of the Constitution, 28 USC (Supp IV) Sec. 2241 (c) (3), the District Court should withhold relief in this collateral habeas corpus action where an adequate remedy available in the criminal proceedings has not been exhausted."

In *White* v. *Ragen*, 324 U.S. 760, 89 L. Ed. 1348, the Court said:

"The availability of such a remedy in the Federal district court, turning as it does on the exhaustion of state corrective processes, see Mooney v. Holohan, supra; Ex Parte Hawk, supra (321 U.S. 116, 117, 88 L.Ed. 574, 575, 64 S. Ct. 448), may also depend upon an application to this Court to review the decision of the state court, and upon the disposition of such an application here. Where the highest state court in which a decision could be had, considers and adjudicates the merits of a petition for habeas corpus, state remedies, including appellate review, are not exhausted so as to permit the filing of a petition for habeas corpus in a Federal district court, unless the Federal question involved is presented to this Court on certiorari or appeal from the state court decision. Ex Parte Hawk, supra (321 U.S. 116, 117, 88 L. Ed. 574, 575, 64 S. Ct. 448)."

In *Brown* v. *Allen*, 344 U.S. 443, 97 L. Ed. 469, the Court said:

"Our delicate and serious responsibility of compelling state conformity to the Constitution by overturning state criminal convictions, should not be exercised without clear evidence of violation."

* * * * *

"The writ of habeas corpus in federal courts is not authorized for state prisoners at the discretion of the

federal court. It is only authorized when a state prisoner is in custody in violation of the Constitution of the United States. 28 USC Section 2241. *That fact is not to be tested by the use of habeas corpus in lieu of an appeal.* To allow habeas corpus in such circumstances would subvert the entire system of state criminal justice and destroy state energy in the detection and punishment of crime."

* * * * *

"The statute requires that the applicant exhaust available state remedies. To show that the time has passed for appeal is not enough to empower the Federal District Court to issue the writ. The judgment must be affirmed."

In *Thompson* v. *Overlade*, C.C.A. 7th, 216 F.2d 492, the Court said:

"It will be noted that petitioner does not allege that he exhausted or even resorted to the ordinary method of appeal from his conviction in the Marshall county, Indiana, circuit court. The general statement in his petition that he had fully complied with the doctrine requiring the exhaustion of all state afforded corrective process is not a sufficient showing of exhaustion of state remedies. . . . *The Burden is upon petitioner in such a situation to affirmatively set forth in his petition for habeas corpus what remedies he pursued in the state court and a justification, if any exists, for his failure to pursue any other state court remedy. The burden is not upon the respondent to point out the state court remedies of which petitioner failed to avail himself."*

The case now before the Court is very similar to the facts in *Ex Parte Royall*, 117 U.S. 241. The question in the *Royall* case was whether the United States Circuit Court should deny the writ to a State prisoner *awaiting trial.* The Supreme Court announced that there is a discretion in the Federal Courts to withhold the writ until after the State

has decided the constitutional questions. The Court explained "that discretion should be exercised in the light of the relations existing, under our system of government, between the judicial tribunals or the Union and of the States, and in recognition of the fact that the public good requires that those relations be not disturbed by unnecessary conflict between Courts equally bound to guard and protect rights secured by the Constitution."

Royall was cited with approval in *Fay* v. *Noia*, 372 U.S. 391.

III.

No Circumstances Exist to Warrant Interference by a Federal Court

The circumstances set out by Petitioner which she claims warrant the issuance of a Writ of Habeas Corpus by a Federal Court even in absence of her admitted refusal to exhaust numerous available State remedies are identical with the circumstances alleged in *Brown* v. *Rayfield*, 320 F.2d 96, cert. den. 375 U.S. 902 (1963) and *Application of Elizabeth P. Wyckoff*, 196 F. Supp. 515, 6 Race Rel. L. Rep. 786.

Mr. Justice Black and Mr. Justice Clark denied an Application for a Writ of Habeas Corpus filed with this Court by Petitioner Wyckoff on July 26, 1961 because "* * * the factual allegations fall far short of showing that there are not Mississippi State processes available by appeal or otherwise for Wyckoff to challenge her State convictions * * *." Said Order further pointed out that these processes "* * * would effectively protect her constiutional rights, particularly since any denial of such rights by the highest Court of a State can be remedied by appropriate Appellate proceedings in the Supreme Court of the United States."

CONCLUSION

We submit to this Court that the District Court properly denied Petitioner's Petition for Writ of Habeas Corpus and said denial was properly affirmed by the Court of Appeals for the Fifth Circuit. We suggest to the Court that 28 U.S.C. 2254 prohibits the granting of an Application for a Writ of Habeas Corpus in behalf of the Petitioner until she has exhausted remedies available in the Courts of the State of Mississippi, but it is not necessary for this Court to pass upon that question since the action of the United States District Court for the Northern District of Mississippi is correct on the ground that discretion rests in said Court to deny said Petition as a matter of comity as developed in the argument contained in this response and the numerous cases cited in support of said argument.

We further submit to this Court that Petitioner can and will obtain a fair trial in the State Courts of Mississippi. As a matter of fact, it is only necessary to cite a few instances of recent decisions by the Supreme Court of Mississippi which clearly show that it does protect the rights of all litigants and shows careful concern where it is alleged that a racial issue is directly or indirectly involved. In *Harper* v. *State*, 171 So.2d 129, 251 Miss. 699 (1965), and *Bass* v. *State*, No. 43,641, decided February 7, 1966, the Supreme Court of Mississippi reversed the Lower Court on the ground of systematic exclusion of Negroes from the jury. In *Moses* v. *State*, 179 So.2d 9 (October 11, 1965), the Supreme Court of Mississippi reversed the Circuit Court of Pike County and discharged Appellant. Robert Moses (now known as Robert Paris) was found guilty and sentenced for a misdemeanor, in which the affidavit charged that he "on or before the 4 day of October 1961, within the corporate

limits of the City aforesaid, did then and there wilfully and unlawfully disturb the public peace by violent and loud offensive and boisterous conduct calculated to provoke a breach of the peace and leading to a breach of the peace, against the peace and dignity of the State of Mississippi."

In *Guyot* v. *State*, 175 So.2d 184 (1965) the Judgment of the Trial Court was reversed and the Appellant discharged.

RESPECTFULLY SUBMITTED, this ..... day of February, 1966.

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By: .....
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 704

JAN HILLEGAS,

Petitioner,

—v.—

JOE SAMS, JR., County Attorney for Lowndes County, Mississippi, and PENN TAYLOR, Sheriff and Custodian of the County Jail of Lowndes County, Mississippi,

Respondents.

Petitioner's Reply Brief

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Respondents.

OPPOSITION TO MOTION TO DISMISS PETITION FOR WRIT OF CERTIORARI

Respondents have moved to dismiss the petition for writ of certiorari in this habeas corpus proceeding on the ground that petitioner, released pending appeal herein, is presently not in the physical custody of the respondents. Nothing of this appears in the record;[1] petitioner's counsel brought the matter to the Court's attention in her petition for certiorari for the purpose of assuring the Court that there was no need for undue haste in consideration of the case. See page 8, n. 3, of the Petition. In any event, since

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[1] On the face of the record, it appears that petitioner is in respondents' custody. Her habeas corpus petition so alleged, see Appendix to Petition, page 15a; nothing to the contrary appears; and both courts below reached the exhaustion issue which petitioner seeks to present to this Court. See *id.*, pages 1a-14a. This alone is sufficient grounds for denial of respondents' motion to dismiss. See *Ex parte Catanzaro*, 138 F.2d 100, 101 (3d Cir. 1943).

even on the facts stated by respondents[3] it appears that petitioner's release pending appeal was effected by the action of the federal habeas corpus court itself, the claim that such release moots the proceeding is frivolous. *Eagles* v. *Samuels*, 329 U.S. 304 (1946); *e.g.*, *Reis* v. *United States*

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[3] The actual facts surrounding petitioner's release are as follows. Between the time of her arrest December 28, 1964 and the date of filing and denial of this habeas corpus petition January 5, 1965, petitioner was respondents' prisoner in the Lowndes County Jail. Following dismissal of her habeas corpus petition by District Judge Clayton on grounds of failure to exhaust state remedies, see Appendix to Petition, page 1a, petitioner's counsel asked Judge Clayton for a certificate of probable cause to appeal. Judge Clayton granted the certificate. Counsel then requested an order staying state prosecution of petitioner and releasing her on her own recognizance or nominal bail pending appeal. Judge Clayton said he did not think an order was necessary, that he believed the matter of stay and release could be amicably arranged with counsel for the respondents. Petitioner's counsel said he thought such an order desirable, in order to protect against possible claims of mootness on appeal. Judge Clayton pointed out that the record would not contain any grounds for a claim of mootness by respondents. Petitioner's counsel replied that, if respondents raised the issue on appeal, he could not in conscience fail to tell the Fifth Circuit and this Court that petitioner was at large. Judge Clayton said he would resolve that matter by obtaining an assurance from respondents' counsel that no claim of mootness would be raised on the appeal; this, he said, would dispense with the need for any formal order on his part releasing the petitioner. In the presence of petitioner's counsel, Judge Clayton then telephoned respondents' counsel, said that he wished the petitioner released, and obtained an assurance that this release would not be made the basis for a contention of subsequent mootness.

In violation of this assurance, respondents filed in the Court of Appeals, on the day of oral argument of the appeal, a motion to dismiss on the ground that petitioner was no longer in respondents' custody. The matter was raised by the Court in oral argument, and petitioner's counsel suggested that if the record were in any regard unclear, he would be pleased to have Judge Clayton supplement it by certifying the facts recited in the first paragraph of this footnote, which clearly brought the case within *Eagles* v. *Samuels*, 329 U.S. 304 (1946). The Court of Appeals saw no need for this; it did not dismiss the appeal; it decided it on the merits and did not bother to address respondents' mootness contention in its opinion.

Marshal, 192 F.Supp. 79, 83 (E.D. Pa. 1961). Respondents' motion to dismiss should be denied.

Respectfully submitted,

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